

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-7523

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-X

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs, Appellants,

-against-

MESSERS. GRENITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning
Appeals of the Town of Hempstead,
State of New York, and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE
TOWN OF HEMPSTEAD,

Defendants, Appellees.

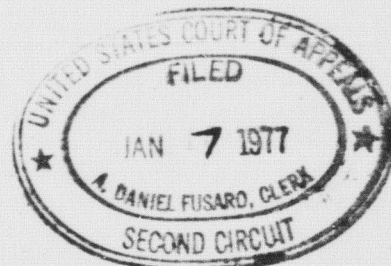
-X

APPEAL FROM
UNITED STATES
DISTRICT COURT
FOR THE EASTERN
DISTRICT OF NEW
YORK - DOCKET
NO. 76-7523

B

APPENDIX

2



RUTH RADOW and SEYMOUR RADOW
Pro, Se

50 Tioga Avenue
Atlantic Beach, N.Y. 11509

PAGINATION AS IN ORIGINAL COPY

APPENDIX - PART 2

TABLE OF CONTENTS

	<u>Appendix Page No.</u>	<u>Brief Page No.</u>
(1) 4/28/75 - Declaratory Complaint of Declaratory and Injunctive relief	30 - 41	1
(5) 5/30/75 Memorandum to Dismiss Fourth Ocean Putnam Corp.	42 - 47	11,12,13
(8) 6/11/75 Motion to Dismiss Memorandum of Law, Town of Hempstead, Board of Zoning Appeals	48 - 57	11, 12, 13
(11) 6/27/75 Affirmation in opposition to Motion to Dismiss		15, 16
(15) 5/24/76 HUD P.741, 6,7,8,9, 750 Exhibit by William Williams for The Town of Hempstead	58 - 64	
Exhibit 6/1/76 1 Answer to Motion for Summary Judgment	65 - 68	3, 17
Exhibit 9/28/76 9 Memorandum by Plaintiffs		2,3,23,24
5/12/76 (17) Stenographers Transcripts	69 - 77	
6/2/76 (16) Stenographers Transcripts	78 - 97	
10/6/75 (21) Stenographers Transcripts	98 - 119	1,7,16,17,18 19, 25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs

-against-

MESSRS, GRENITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN, and WEXNER,
Constituting the Board of Zoning
appeals of the Town of Hempstead,
State of New York and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE TOWN:
OF HEMPSTEAD.

Defendants

No.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF.

DAVID M. ETTINGER, ESQ.,
Attorney for Plaintiffs
Office and P.O. Address
10 East 40th Street
New York, New York 10016

(212) 532-2225

I. JURISDICTION

1. A jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1331 (a), 1343 and 2201, et seq., this suit being authorized by Title 42 United States Code, Section 1983. This is an action for a declaratory judgment and appropriate equitable relief to prevent further deprivation under color of state law, statute, or ordinance, of rights, privileges and immunities secured to plaintiffs by the Constitution and Statutes of the United States, including the right to equal protection and due process of law under the Fourteenth Amendment to the Constitution of the United States and under Title 42, United States Code, Section 1983.

II. PARTIES PLAINTIFF

2. RUTH RADOW, is a resident of the Incorporated Village of Atlantic Beach, in the Town of Hempstead, Nassau County, State of New York, residing at 50 Tioga Avenue, Atlantic Beach, New York.

3. SEYMOUR RADOW, is a resident of the Incorporated Village of Atlantic Beach, in the Town of Hempstead, Nassau County, State of New York, residing at 50 Tioga Avenue, Atlantic Beach, New York.

4. That plaintiffs, RUTH RADOW and SEYMOUR RADOW are husband and wife, and as more fully set forth herein, they are the owners of a single family residence within the Incorporated

Village of Atlantic Beach, County of Nassau, State of New York.

III. PARTIES DEFENDANT

5. MESSRS, GRENITO, PETERSON, TRAPANI, WALKER, ROSE, YACHNIN, AND WEXNER, constitute the Board of Zoning Appeals of the Town of Hempstead, County of Nassau , State of New York.

6. Said individuals as indicated above constituting the Board of Zoning Appeals of the Town of Hempstead are sued herein in the official capacity.

7. That the FOURTH OCEAN PUTNAM CORPORATION, is a corporation incorporated under and by virtue of the laws of the State of New York, maintaining a place of business within the County of Nassau, Incorporated Village of Atlantic Beach, State of New York.

8. That the TOWN OF HEMPSTEAD is a municipality, duly incorporated under the laws of the State of New York situated in the County of Nassau.

9. That the said defendants MESSRS. GRENITO, PETERSON, TRAPANI, WALKER, ROSE, YACHNIN, and WEXNER, at all times hereinafter mentioned constituted and still constitute the Board of Zoning Appeals of the Town of Hempstead, State of New York of which said Board, the said ARMAND GRENITO is and was at all times hereinafter mentioned, Chairman.

10. That prior to the 24th day of April 1974, the FOURTH OCEAN PUTNAM CORPORATION, the owners of certain real property located in the Incorporated Village of Atlantic Beach, Town of

Hempstead, County of Nassau, made an application for an extension of business use in conjunction with a proposed Hotel and Bath Club before the Board of Zoning Appeals of the Town of Hempstead, County of Nassau, pursuant to the applicable provision of the Town Law of the Town of Hempstead, State of New York, and Building Zoning Ordinances and amendments effective thereunder.

11. That pursuant to the said application, and on or about the 24th day of April 1974, the FOURTH OCEAN PUTNAM CORPORATION, the owners of certain real property as aforesaid located in the Incorporated Village of Atlantic Beach, Town of Hempstead, County of Nassau, State of New York made application for use of premises for Hotel and Bath Club before the Board of Zoning Appeals of the Town of Hempstead, under case #245.

12. That on or about the said 24th day of April 1974, THE FOURTH OCEAN PUTNAM CORPORATION, the owners of the said real property located in the Incorporated Village of Atlantic Beach, Town of Hempstead, County of Nassau, State of New York, made an application to park in said back area, under case #246 before the Board of Zoning Appeals of the Town of Hempstead.

13. That on or about the 24th day of April 1974, the FOURTH OCEAN PUTNAM CORPORATION, the owners of certain real property located in the Incorporated Village of Atlantic Beach, Town of Hempstead, County of Nassau, State of New York, made an application for the use and permission for Bath Club, for lockers, and for cabanas under case # 247 before the Board of Zoning Appeals for the Town of Hempstead.

14. That on or about the 24th day of April 1974, THE FOURTH OCEAN PUTNAM CORPORATION, the owners of certain real property located in the Incorporated Village of Atlantic Beach, Town of Hempstead, County of Nassau, State of New York, made an application to construct a swimming pool for accessory use to the Hotel and Bath Club under Case #248 before the Board of Zoning Appeals of the Town of Hempstead.

15. That a portion of the front of the parcel in question (1,253.21 feet) is within a business district to a depth of 170 feet, the remaining 1083.21 feet is zoned residence "B".

16. That thereafter and on or about the 24th day of April 1974, a hearing was held before the Board of Zoning Appeals for the Town of Hempstead as designated by its calendar, and at the said hearing there appeared representatives on behalf of the FOURTH OCEAN PUTNAM CORPORATION, the Incorporated Village of Atlantic Beach, residents of the Incorporated Village of Atlantic Beach, and purported experts in support, and in opposition to the said application before the Board of Zoning Appeals.

17. That after said hearings, the said Board of Zoning Appeals denied the application in regard to Case #246 as it pertained to permission to park in said front set back in the area in question, and granted all applications in regard to cases numbered, 244, 245, 247, and 248, as aforesaid.

18. That the said property upon which the proposed building and appertinances, is to be erected is located on the South Side of Ocean Blvd., between Vernon Avenue and Putnam

Avenue in the Incorporated Village of Atlantic Beach.

19. That parcel is within a business district to a depth of 170 feet; and the remaining depth is zoned residence "B" is irregular and varies from approximately 210 feet to 270+ feet as it extends to the mean high water line of the Atlantic Ocean. The parcel is presently improved with a six story hotel set back 11.6 feet from, and having a frontage of 140+ on the Southern side of Ocean Blvd. The easterly side of the hotel is approximately in line with the westerly side of Suffolk Blvd., and the hotel thus extends westerly the said 140+ feet from Suffolk Blvd., The hotel then curves south-westerly reducing to two stories and then arising to three stories. The hotel therefore extends some 305 feet along Ocean Blvd., the westerly wing however, being set back approximately 110 feet. A two story one story accessory building approximately 48 feet by 40 feet set back 16.4 feet from Ocean Blvd., is located just East of Suffolk Blvd.,

20. That abutting the business district as indicated aforesaid, on its south side is the Board Walk wherein the residents of the Incorporated Village of Atlantic Beach, possess an easement to pass over the said Board Walk with the obligation to maintain the said Board Walk being that of the abutting owner, THE FOURTH OCEAN PUTNAM CORPORATION.

21. The present facility extends approximately 30 feet into the residence "B" area for almost the entire width of the parcel and 50 feet for the portion including the most southerly line of cabanas.

22. That the said action and determination of the Board of Zoning Appeals of the Town of Hempstead, County of Nassau, State of New York was and is illegal in that the said Board of Zoning Appeals proceeded to act on said application, and did make a determination therein without jurisdiction to act in the matter, namely that the Board of Zoning Appeals did not have the authority to re-zone property from commercial to zone "b" status.

23. That the real property owned by the plaintiffs is situated and located within an area of frontage which would be immediately affected by the said proposed building.

24. That the said determination of the Board of Zoning Appeals of the Town of Hempstead, County of Nassau, State of New York was improper in that it allows accessory parking into an area zoned residence "B".

25. That the said determination by the Board of Zoning Appeals of the Town of Hempstead, County of Nassau, State of New York was improper in that it granted a use to the applicant for THE FOURTH OCEAN PUTNAM CORPORATION, to the Board Walk tantamount to an easement, and not within the jurisdiction of the said Board, for which there is present an easement perpetuity enuring to the benefit herein, as residents of the Incorporated Village of Atlantic Beach, in that the ordinance and Town Law, upon which the action of the Board of Zoning Appeals is based, is unconstitutional, illegal, and invalid in that the same was not passed for the purpose of public health, safety, or morals as required by the statute under which the said ordinance was passed, but for purposes other than that

required by statute.

26. That the said ordinance and action of the Board of Zoning Appeals based thereon, violates the Articles of the Constitution of the State of New York, and the Articles of the Constitution of the United States, which Articles in substance forbid the passage of any law depriving any person of property without due process of law, and that by reason of the foregoing facts and circumstances, plaintiffs have been and will be deprived of the use of their property and that the market value of the said property has been greatly depreciated and will be greatly depreciated by the existence of the building sought to be erected by the defendant FOURTH OCEAN PUTNAM CORPORATION.

27. That the said action and determination of the Board of Zoning Appeals was illegal in that it improperly found that the use and existing character of the area, was that of cabana clubs, beach resort uses and hotels improperly inserting the use of hotels in an otherwise clear area consisting of cabana clubs and beach resort type facilities.

28. That the said action and determination by the Board of Zoning Appeals was illegal and improper in finding that the proposed use would not have an adverse effect or depreciate property values on the surrounding property and incorrectly held that the proposed use would conserve property values and encourage the appropriate use of land.

29. That the said action and determination by the Board of Zoning Appeals improperly found that the off street parking ordinance was in fact complied with and would not

increase vehicular traffic and the congestion of the public streets and highways, while at the same time giving approval to the 70% increase in total hotel capacity over the existing site.

30. That the said action and determination of the Board of Zoning Appeals was improper in finding that the proposed use did not create an unusual problem in terms of garbage removal, in finding that there were facilities for the removal of discharge of sewage, refuse, or other matter without indicating the substance and basis of said determination.

31. That the said action and determination of the Board of Zoning Appeals was improper in finding that the proposed use would not adversely effect the light, when in fact simple observation of a six story hotel casting a shadow along the beach, more than speaks for itself.

32. That the said determination of the Board of Zoning Appeals was improper in finding that the proposed use would not cause undue interference with the orderly enjoyment by the public of the existing recreational facilities, when in fact parks exist on the property for the use and benefit of the residents would be demolished.

33. That the said action and determination of the Board of Zoning Appeals was improper, in its finding that the proposed use was in fact constructed, that there would be no creation of hazard to life limb or property because of fire, flood or erosion, when in fact there has been no increase in the fire personnel; the problem of erosion has increased at alarming rates and the Corp of Army Engineers of the United States Army

has declared that the Incorporated Village of Atlantic Beach to be in a flood plain area.

34. That the said action and determination of the Board of Zoning Appeals is improper in that it contravenes the rights of the residents located in a "flood plain area" requiring flood insurance coverage, it being a prima facie violation of Section 4022 of the National Flood Insurance Act.

35. That the said action and determination of the Board of Zoning Appeals was improper in its findings that the physical characteristics and topography of the land was substantially flat, without taking into consideration the existence of the Atlantic Ocean.

36. That the said action and determination of the Board of Zoning Appeals was improper in that it found that the use was not unreasonably near a "recreational area" without understanding the existence of the beach and Board Walk itself as a recreational area.

37. That the said action and determination of the Board of Zoning Appeals was improper in its finding that the proposed use did not upset the present water supply, without any affirmative proof, and in the face of statements made that a previous hotel burned to the ground while fire facilities ran out of water.

38. That the action and determination of the Board of Zoning Appeals was improper in its failure and refusal to take into consideration the aspects of the National Flood Insurance program as it affects the property owners and in its improper application of the provisions of the said Federal Legislation.

39. That the action and determination of the Board of Zoning Appeals was improper in its finding that the extension of business use into the residence "B" district is in existence an acceptable area characteristic.

41. Plaintiffs herein desire to continue to use the beach in front of their home, which use is a normal incident of residence of the Incorporated Village of Atlantic Beach, as secured by the Village Ordinance, and decisions of the Courts of the State of New York.

42. That the Incorporated Village of Atlantic Beach, yearly, issues beach permits for the residents of the Village of Atlantic Beach, and the plaintiffs herein will be deprived of the use of the beach in front of their home as a result of the erection of the purposed hotel, which deprives the plaintiffs of rights secured to them by the Constitution of the United States, and more particularly:

A. The ordinance denies the plaintiffs equal protection of the laws;

B. The ordinance and the action taken thereon intrudes upon the sphere of privacy secured to the plaintiffs by diverse provisions of the Constitution;

C. The ordinance and the decisions based thereon contravene the right to travel by the plaintiffs herein from one portion of the beach to the other.

PRAYER FOR RELIEF

WHEREFORE; Plaintiffs pray for the following relief:

1. A temporary restraining order, restraining and enjoining the defendants herein, and anyone acting in concert with them, from commencing erection of any portion of the building purposed by the defendants FOURTH OCEAN PUTNAM CORPORATION, upon which their application before the defendant THE BOARD OF ZONING APPEALS OF THE TOWN OF HEMPSTEAD, has in fact been approved to date.

2. A judgment declaring the Building Zone Ordinance of the Town of Hempstead, County of Nassau, State of New York, to be unconstitutional insofar as it allowed the deprivation of personal property without due process.

3. A judgment declaring the action of the Board of Zoning Appeals of the Town of Hempstead, County of Nassau State of New York in contravention of the action taken by the Congress of the United States in the enactment of the National Flood Insurance Act, and the actions and determinations of the Environmental Protection Agency of the Executive Branch of the United States Government in that the plaintiffs herein, will be deprived of the resources of the Federal Government in the supplemenation of Flood Insurance as a result of the prima facie violation by the Town of Hempstead, and the Board of Zoning Appeals in complying with the provisions of the Federal Flood Insurance Act as aforesaid.

4. Such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

DAVID M. ETTINGER
Attorney for Plaintiffs
10 East 40th Street
New York, New York 10016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs,

-against-

MESSERS, GRENTI, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning Appeals of the
Town of Hempstead, State of New York, and THE
FOURTH OCEAN PUTNAM CORPORATION, and
THE TOWN OF HEMPSTEAD,

Defendants.

Civil Index No.
75C638

MOTION TO DISMISS
FOR LACK OF
JURISDICTION OVER
THE SUBJECT
MATTER

Defendants, FOURTH OCEAN PUTNAM CORPORATION, move
the court to dismiss this action on the ground that the court lacks jurisdiction
over the subject matter of the proceeding since the matter is not one that
arises under the Constitution nor involves a denial of due process.

MARGIOTTA, LEVITT & RICIGLIANO
Attorneys for Defendant - FOURTH OCEAN
PUTNAM CORPORATION
955 Front Street
Unlondale, New York 11553

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs,

-against-

MESSERS. GRENITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning Appeals of the
Town of Hempstead, State of New York, and THE
FOURTH OCEAN PUTNAM CORPORATION, and
THE TOWN OF HEMPSTEAD,

Defendants.

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION TO DISMISS
THE COMPLAINT
FOR LACK OF
JURISDICTION OVER
THE SUBJECT
MATTER

MICHAEL J. RICIGLIANO, being duly sworn, deposes and says
that I am a partner in the law firm of MARGIOTTA, LEVITT & RICIGLIANO,
the attorneys for the defendant, FOURTH OCEAN PUTNAM CORPORATION,
and submit this affidavit in support of defendants' motion to dismiss the
complaint for lack of jurisdiction over the subject matter.

1. The plaintiffs bring this action for a declaratory judgment and
appropriate equitable relief to prevent the commencement of the erection of
a hotel to be located in the Incorporated Village of Atlantic Beach, Town of
Hempstead, County of Nassau, and State of New York, for which permission
to commence construction was granted by the defendant Board of Zoning
Appeals of the Town of Hempstead. This grant was as a result of a decision
of said Board of Zoning Appeals dated February 6, 1975. The plaintiffs in
this proceeding within the jurisdictional time allowed appealed the decision

of the Town of Hempstead Board of Zoning Appeals to the Supreme Court of the State of New York for the County of Nassau, by virtue of an Article commenced under Article 78 of the New York State Civil Practice Law and Rules, said review being commenced by the service of an order to show cause dated March 12, 1975, with supporting petition. The defendant, Board of Zoning Appeals, and the defendant, Fourth Ocean Putnam Corp., prepared an answer and return which was filed with the Supreme Court of the County of Nassau and the matter came on for oral argument before Mr. Justice Joseph A. Suozzi on April 4, 1975. The matter is presently pending before Mr. Justice Suozzi and a decision has not been rendered as of this date. (Matter of Application of Michael Brady, Petitioner, v. Messers. Granito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead, and Fourth Ocean Putnam Corporation, Index No. 3459/1975).

The plaintiffs now bring this proceeding in Federal Court to set aside the decision of said Board of Zoning Appeals of the Town of Hempstead and contend that the decision of the Board of Zoning Appeals violated their Constitutional rights including the right to equal protection and due process of law under the 14th Amendment of the Constitution of the United States and under Title 42 of the United States Code, Section 1983.

2. The complaint prepared on behalf of the plaintiffs is identical to the Article 78 proceeding that is presently pending before the Supreme Court of the County of Nassau. It is clear from a reading of the complaint

together with the prayer for relief sought by the plaintiffs herein that there are no jurisdictional facts contained in the pleadings which would give rise to jurisdictional facts that would allow the Federal Courts to entertain jurisdiction of the matter.

The Federal Courts have previously held that a mere formal averment that the cause was one arising under the Constitution and laws of the United States was not sufficient, but the plaintiff had to plead facts disclosing that the suit really and substantially involved a dispute or controversy as to a right which depended on the Constitution or application of the Constitution or some law or treaty of the United States. (South Covington & Cincinnati Street Railway Co. v. Newport, 259 U.S. 97, 66 LEd 842, 42 SCR 418)

It is the settled interpretation that a suit arises under the Constitution or laws of the United States only when the plaintiffs statement of his cause of action shows that it is based upon some provision of the Constitution or some law of the United States; and if it does not appear from the plaintiff's petition or complaint, it cannot be shown by the answer of the defendant, or any subsequent pleading in the case. (Bronson v. Board of Supervisors [DC-Iowa] 237 Fed. 212)

Since there is no statutory basis for jurisdiction, the plaintiffs do not have any right to proceed or be proceeded against in the first instance in a Federal rather than a State Court. (McFaddin Express, Inc. v. Adley Corp., 240 FSupp 791, Aff'd. 346 F 2d 424)

The mere allegation contained in the plaintiffs' complaint was that it was one arising under the Constitution and this alone is not sufficient

to confer jurisdiction upon the Federal Courts.

The Court in *Gibbs v. Crandall*, 120 U.S. 105, held that a general allegation that the suit was one arising under the Constitution was, standing alone, insufficient; the pleader had to state facts sufficient to enable the Court to see whether the right he claimed really and substantially depended upon a construction of that instrument.

It is clear from a review of the plaintiffs' complaint that no such allegations are alleged or shown.

The plaintiffs further allege that he was denied due process of law under the 14th Amendment to the Constitution and attempts to confer Federal jurisdiction based on his right to equal protection and due process of law.

From a review of the plaintiffs' complaint, it is clear that the plaintiff has not been denied due process, but has, in fact, been given every opportunity for due process in that he objected to the matter at the hearing before the Board of Zoning Appeals and prosecuted his right to appeal by virtue of an Article 78 proceeding to the Supreme Court of the State of New York, a matter which is presently pending.

The mere fact that the plaintiff may not like the results that he has obtained in the State Court does not permit him to now seek relief in the Federal Court.

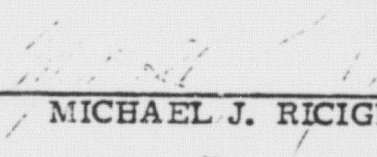
The Federal Courts have continually held that the due process clause was not a guarantee against the use or results by parties to private litigation in State Courts, nor did it afford a Constitutional basis for relief

in the Federal Courts from a judgment in such litigation obtained by those means. (Butler v. Butler, 136 F 2d 644)

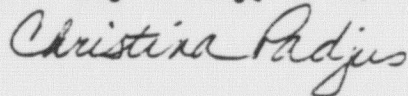
It is respectfully submitted that all the issues raised by the plaintiffs herein were raised in the proceeding that is presently pending before the Supreme Court of the County of Nassau.

It is further respectfully submitted that the determination of the respondent Board of Zoning Appeals in the granting of an application sought by the defendant, Fourth Ocean Putnam Corp., was one that was a matter of municipal concern under Section 267 of the Town Law of the State of New York, and the review as to determine if the decision of the local Board of Zoning Appeals is arbitrary, capricious should be determined by a State Court of general jurisdiction.

WHEREFORE, defendant, FOURTH OCEAN PUTNAM CORPORATION, requests that the complaint of the plaintiffs herein be in all respects dismissed.


MICHAEL J. RICIGLIANO

Sworn to before me this
28th day of May, 1975.



CHRISTINA PADJUS
NOTARY PUBLIC State of New York
No. 30-4502986
Qualified in Nassau County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs,

- against -

Civil Index No.
75C638

MESSERS, GRENITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning
Appeals of the Town of Hempstead,
State of New York, and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE
TOWN OF HEMPSTEAD,

Defendants.

MOTION TO DISMISS
FOR LACK OF JURISDIC-
TION OVER THE SUBJECT
MATTER.

Defendants, Messers, Grenito, Peterson, Trapani, Walker,
Rose, Yachnin and Wexner, Constituting the Board of Zoning
Appeals of the Town of Hempstead, State of New York, and the
Town of Hempstead, move this Court to dismiss this action on
the ground that the Court lacks jurisdiction because the amount
in controversy is less than \$10,000.00, inclusive of interest
and costs, in that if any one or more of the plaintiffs have any
claim against one or more of any defendants, none of which
claims separately equal or exceed \$10,000.00 and such claims
cannot be aggregated for purposes of the amount-in-controversy
requirement.

W. KENNETH CHAVE, JR.
Town Attorney and
Attorney for Defendants
Board of Zoning Appeals
of the Town of Hempstead
and the Town of Hempstead.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

49

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs,

- against -

MESSERS, GRENITO, PETERSON, TRAPANI,
WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning
Appeals of the Town of Hempstead,
State of New York, and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE
TOWN OF HEMPSTEAD,

Defendants.

AFFIDAVIT IN SUPPORT
OF DEFENDANTS'
MOTION TO DISMISS
THE COMPLAINT FOR
LACK OF JURISDICTION
OVER THE SUBJECT
MATTER.

JEFFREY L. STADLER, being duly sworn, deposes and says
that he is a Deputy Town Attorney for the Town of Hempstead, is
associated with W. KENNETH CHAVE, JR., Town Attorney and attorney
for defendants Messers Grenito, Peterson, Trapani, Walker, Rose,
Yachnin and Wexner, constituting the Board of Zoning Appeals of
the Town of Hempstead, State of New York, and the Town of Hemp-
stead, and makes this affidavit in support of defendants' motion
to dismiss the complaint for lack of jurisdiction over the sub-
ject matter.

1. Plaintiffs bring this action for a declaratory judg-
ment and appropriate equitable relief to prevent the commencement
of the erection of a hotel to be located in the Incorporated
Village of Atlantic Beach, Town of Hempstead, County of Nassau,
State of New York, for which permission to commence construction
was granted by the defendants, Messers Grenito, Peterson, Trapani,
Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning
Appeals of the Town of Hempstead, by decision dated February 6,

1975. The decision of the defendant Board of Zoning Appeals is presently before the Supreme Court of the State of New York, County of Nassau, by virtue of an article commenced under Article 78 of the New York State Civil Practice Law and Rules, in the nature of certiorari, said review being commenced by the service of an order to show cause, dated March 12, 1975, with supporting petition verified March 11, 1975. The respondents in that proceeding, Messers Granito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead, caused their answer and return, pursuant to Section 7804 of the CPLR, to be filed with the Court and the matter came on for oral argument before Mr. Justice Joseph A. Suozzi, on April 4, 1975, a decision having not been rendered as of this date (Matter of Application of Michael Brady, Petitioner v. Messers Granito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead, State of New York, and Fourth Ocean Putnam Corporation, Index No. 3459/1975).

2. 28 USC Sections 1331(a) and 1332(a), require that the matter in controversy exceed, exclusive of interest and costs, the sum of \$10,000.00. From a reading of the complaint, together with the prayer for relief sought by the plaintiffs herein, there is absent an allegation which would satisfy the jurisdictional amount requirement. A careful reading will further suggest that not even a general allegation of jurisdictional amount presents itself in the complaint or the prayer for relief.

It is respectfully submitted that all issues raised by the plaintiffs herein were raised in the pending matter to review

the determination of the defendants Messers Grenito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead, State of New York, at the Supreme Court, State of New York, in the County of Nassau, pursuant to the applicable provisions of Article 78 of the New York State Civil Practice Law and Rules.

It is further submitted that the determination of said respondents in the granting of an application to construct a hotel, cabanas, lockers and an accessory swimming pool is a matter of municipal concern under Section 267 of the Town Law of the State of New York, and the review as to determine if the decision of a local Board of Zoning Appeals is arbitrary, capricious and requires reversal or annulment should be determined by a State court of general jurisdiction.

WHEREFORE, defendants Messers Grenito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead and the Town of Hempstead, request that the complaint of the plaintiffs herein be, in all respects, dismissed.

5/

JEFFREY L. STADLER

Sworn to before me this

10 day of *June*, 1975.

C. WILLIAM GAYLOR
NOTARY PUBLIC, State of New York
No. 30-6474200
Qualified in Nassau County
Commission Expires March 30, 1976

51

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
RUTH RADOW and SEYMOUR RADOW, :

Plaintiffs, :

-against- :

MESSRS. GRENITO, PETERSON, TRAPANI, :
WALKER, ROSE, YACHNIN and WEXNER, :
Constituting the Board of Zoning :
Appeals of the Town of Hempstead, :
State of New York, and THE FOURTH :
OCEAN PUTNAM CORPORATION and THE :
TOWN OF HEMPSTEAD, :

Defendants. :

----- x
MEMORANDUM OF LAW ON BEHALF OF MOTION
TO DISMISS SUBMITTED FOR DEFENDANTS
GRENITO, ET AL AND THE TOWN OF HEMPSTEAD.

STATEMENT

This memorandum is submitted in support of the defendants', Grenito, et al., and the Town of Hempstead, motion to dismiss this action on the ground that the Court lacks jurisdiction because the amount in controversy does not exceed \$10,000.00, either separately or in the aggregate, of all claims.

FACTS

The facts have been set forth in the affidavit of Jeffrey L. Stadler in support of the motion to dismiss and in the affidavit of Michael J. Ricigliano, attorney for the defendant, Fourth Ocean Putnam Corporation in his motion to dismiss for lack of jurisdiction.

RELEVANT STATUTES

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and, arises under the Constitution, laws, or treaties of the United States.

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by

the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

POINT I

WHERE EVIDENCE FAILS TO ESTABLISH
REQUISITE JURISDICTIONAL AMOUNT SO
AS TO SUSTAIN FEDERAL JURISDICTION,
THE DISTRICT COURT SHOULD DISMISS THE
COMPLAINT.

The general federal question jurisdiction vested in the District Courts by 28 U.S.C. Section 1331 is limited by the terms of the statute to cases where, "The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs..." The significant fact is that the amount placed in the controversy by the complaint must meet the jurisdictional minimum, Lavine & Horning Manual of Federal Practice, McGraw-Hill Book Company, (1967) Section 1.72, 1.73, Lobianco v. Valley Forge Military Academy 224 F. Supp. 395, aff'd 331 F. 2nd 851, Payton v. Freeze, 49 F.R.D. 11.

A careful reading of the entire complaint in this proceeding reveals that there is no allegation of any amount in controversy and that the relief sought by the plaintiff is not a monetary relief but a declaratory judgment. Paragraph designated "I. JURISDICTION" of the complaint states, "This is an action for a declaratory judgment and appropriate equitable relief..." Paragraphs designated "II" and "III" of the complaint set forth the purported cause of action in favor of the plaintiffs. A careful reading will suggest that while there are vague references to the National Fire Insurance Act and denial of the plaintiffs' equal protection of the laws, the gravamen of the complaint is to the

55

effect that the plaintiffs' allege that a determination of a municipal Board of Zoning Appeals has adversely affected their property rights. The value of the property rights which the determination of the defendant, Board of Zoning Appeals, allegedly adversely affected, is not set forth and could not in good conscience be set forth by the plaintiffs for to do so would be an act of conjecture and uncertainty.

Plaintiffs herein appeared before the defendants, Grenito, et al. constituting the Board of Zoning Appeals of the Town of Hempstead and vigorously opposed the application of the co-defendant herein, Fourth Ocean Putnam Corporation, for certain special use permit and variances. The Board did not concur with the plaintiffs and granted the request relief with conditions. An appeal for the Board's determination, pursuant to Article 78 of the CPLR is now pending before the Supreme Court, County of Nassau. An allegation that the petitioners were denied equal protection of the laws is without merit.

POINT III

28 U.S.C. 2201 ET SEQ. DOES
NOT EXPAND THE JURISDICTION
OF THIS COURT.

Plaintiffs have set forth 28 U. S. C. 2201 as a jurisdictional basis for this Court. It is, however, clear that the subject Declaratory Judgment Act is not a grant of jurisdiction to the District Courts but merely establishes an additional remedy exercisable only in cases where the Courts have jurisdiction under other laws. West Publishing Co., v. McColgan, 138 F. 2d 320; Southern Pacific Co. v. McAdoo, 82 F. 2d 121; Van Buskirk v. Wilkerson, 216 F. 2d 735.

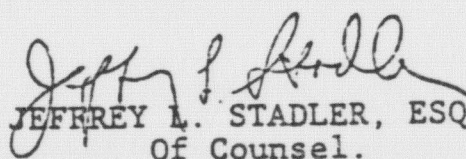
As stated in the Manual of Federal Practice, previously cited, "It is of course necessary, in order for a Federal Court to have jurisdiction of an action under the Federal Declaratory Judgment Act, that the statutory requirement of a case or controversy be satisfied." §1.122.

CONCLUSION

For the reasons heretofore set forth, the complaint should be dismissed for lack of jurisdiction.

Respectfully submitted,

W. KENNETH CHAVE, JR., ESQ.,
Town Attorney and Attorney
for Defendants Grenito, et
al., and Town of Hempstead.


JEFFREY L. STADLER, ESQ.,
Of Counsel.



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Reprinted from Code of
Federal Regulations

Title 24 - Revised as of April 1, 1973

RECEIVED

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DEPARTMENT OF PLANNING
AND
ECONOMIC DEVELOPMENT

58

SUBCHAPTER B—NATIONAL FLOOD INSURANCE PROGRAM

PART 1909—GENERAL PROVISIONS

Subpart A—General

- Sec.
1909.1 Definitions.
1909.2 Description of program.
1909.3 Emergency program.

Subpart B—Eligibility Requirements

- 1909.21 Purpose of subpart.
1909.22 Prerequisites for the sale of flood insurance.
1909.23 Priorities for the sale of flood insurance under the regular program.
1909.24 Suspensions of community eligibility.

AUTHORITY: The provisions of this Part 1909 issued under sec. 7(d), 79 Stat. 670; 42 U.S.C. 3535(d); sec. 1306, 82 Stat. 575; 42 U.S.C. 4013; sec. 1361, 82 Stat. 587; 42 U.S.C. 4102.

SOURCE: The provisions of this Part 1909 appear at 36 F.R. 24759, Dec. 22, 1971, unless otherwise noted.

Subpart A—General

§ 1909.1 Definitions.

As used in this subchapter—

"Accounting period" means any annual period during which the agreement is in effect, commencing on July 1 and ending on June 30. Each accounting period under the agreement applies separately to the insurance premiums payable, losses incurred, premium equalization and reinsurance payments due, and operating costs and allowances attributable with respect to all policies issued under the program during the accounting period.

"Act" means the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001-4127.

"Actuarial rates" means the risk premium rates, estimated by the Administrator for individual communities pursuant to studies and investigations undertaken by him in accordance with section 1307 of the Act in order to provide flood insurance in accordance with accepted actuarial principles. Actuarial rates also contain provision for operating costs and allowances.

"Actuarial rate zone" means a zone identified on a Flood Insurance Rate Map as subject to a specified degree of flood or mudslide hazards, to which a particular set of actuarial rates applies.

"Administrator" means the Federal Insurance Administrator, to whom the Secretary has delegated the administration of the program (34 F.R. 2680-81, Feb 27, 1969).

"Affiliates" means two or more associated business concerns which are or can be directly or indirectly controlled by one or more of the affiliates or by a third party.

"Agreement" means the contract entered into for any accounting period by and between the Administrator and the Association whereby the Association will provide policies of flood insurance under the program within designated areas and will adjust and pay claims for losses arising under such policies. The agreement is renewed automatically with respect to each subsequent accounting period unless either the Administrator or the Association gives the other written notice of intention to terminate on or before January 31 of the then current accounting period.

"Applicant" means a community whose legislative body has indicated a desire to participate in the National Flood Insurance Program.

"Association" means the National Flood Insurers Association and, as the context may indicate, the insurance pool composed of two or more of its members or any member acting for or on behalf of the Association under the agreement.

"Chargeable rates" means the reasonable premium rates, estimated by the Administrator in accordance with section 1308 of the Act, which are established in order to encourage the purchase of flood insurance.

"Coastal high hazard area" means the portion of a coastal flood plain having special flood hazards that is subject to high velocity waters, including hurricane wave wash and tsunamis.

"Community" means any State or political subdivision thereof with authority to adopt and enforce land use and control measures for the areas within its jurisdiction.

"Criteria" means the comprehensive criteria for land use and control measures developed under section 1361 of the Act for the purposes set forth in §§ 1910.2 and 1910.42 of this subchapter.

thority, and means to implement the commitments made in paragraph (a) of this section; and

(2) Designate an official responsible to submit, on each anniversary date of the community's initial eligibility, an annual report to the Administrator on the progress made during the past year within the community in the development and implementation of flood plain and/or mudslide area management measures.

(c) The documents required by paragraph (a) of this section and evidence of the actions required by paragraph (b) of this section must be submitted to the Federal Insurance Administrator, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

§ 1909.23 Priorities for the sale of flood insurance under the regular program.

Communities which comply with the requirements of § 1909.22 are placed on a register of areas eligible for ratemaking studies and will be selected from this register for ratemaking studies on the basis of the following considerations—

(a) Location of community and urgency of need for flood insurance;

(b) Population of community and intensity of existing or proposed development of the flood plain and/or the mudslide area;

(c) Availability of information on the community with respect to its flood and/or mudslide characteristics and previous losses;

(d) Recommendations of State officials as to communities within the State which should have priorities in flood insurance availability; and

(e) Extent of State and local progress in flood plain and/or mudslide area management, including actual adoption of land use and control regulations consistent with related ongoing programs in the area.

§ 1909.24 Suspensions of community eligibility.

(a) A community eligible for the sale of flood insurance which fails to provide official notice to the Administrator by December 31, 1971, that it has adopted land use and control measures for its flood-prone and mudslide-prone areas in accordance with the requirements of Subpart A of Part 1910 of this subchapter shall automatically lose its eligibility

at midnight on that date. A community which provides such official notice but fails to submit the required land use and control measures to the Administrator by January 15, 1972, for review shall automatically lose its eligibility at midnight on that date. The community's eligibility shall remain terminated until the land use and control measures have been received by the Administrator.

(b) The Administrator shall promptly notify the Association of those communities whose eligibility has been suspended, and the Association shall promptly so notify its servicing companies. Flood insurance shall not be sold or renewed in any suspended community until the Association is subsequently notified by the Administrator of the date of the community's formal reinstatement. Policies sold or renewed within a community during a period of ineligibility shall be deemed void and unenforceable whether or not the parties to the sale or renewal had actual notice of the ineligibility.

(c) Communities eligible for the sale of flood insurance after December 31, 1971, shall not thereafter lose their eligibility because of the inadequacy of the land use and control measures they have adopted except upon 30 days' prior written notice and publication in the FEDERAL REGISTER.

PART 1910—CRITERIA FOR LAND MANAGEMENT AND USE

Subpart A—Requirements for Land Use and Control Measures

- | | |
|--------|---|
| Sec. | |
| 1910.1 | Purpose of subpart. |
| 1910.2 | Minimum compliance with land management criteria. |
| 1910.3 | Required land use and control measures for flood-prone areas. |
| 1910.4 | Required land use and control measures for mudslide areas. |
| 1910.5 | Exceptions because of local conditions. |
| 1910.6 | Revisions of criteria for land use and control. |

Subpart B—Additional Considerations in Managing Flood-Prone and Mudslide-Prone Areas

- | | |
|---------|---|
| 1910.21 | Purpose of subpart. |
| 1910.22 | State and local development goals. |
| 1910.23 | Planning considerations for flood-prone areas. |
| 1910.24 | Planning considerations for mudslide-prone areas. |
| 1910.25 | State coordination. |
| 1910.26 | Local coordination. |

AUTHORITY: The provisions of this Part 1910 issued under 7(d), 79 Stat. 670; 42 U.S.C.

3535(d); sec. 1306, 82 Stat. 575; 42 U.S.C. 4012; sec. 1361, 82 Stat. 587; 42 U.S.C. 4102.

SOURCE: The provisions of this Part 1910 appear at 36 F.R. 24762, Dec. 22, 1971, unless otherwise noted.

Subpart A—Requirements for Land Use and Control Measures

§ 1910.1 Purpose of subpart.

(a) Section 1315 of the Act provides that flood insurance shall not be sold or renewed under the program within a community after December 31, 1971, unless the community has adopted adequate land use and control measures consistent with Federal criteria. Responsibility for establishing such criteria is delegated to the Administrator.

(b) This subpart sets forth the criteria developed in accordance with section 1361 of the Act by which the Administrator will determine the adequacy of a community's land use and control measures. These measures must be applied uniformly throughout the community to all privately and publicly owned land within flood-prone or mudslide areas. Except as otherwise provided in § 1910.5, the adequacy of such measures shall be determined on the basis of the standards set forth in § 1910.3 for flood-prone areas and in § 1910.4 for mudslide areas.

(c) Nothing in this subpart shall be construed as modifying or replacing the general requirement that all eligible communities must take into account flood and mudslide hazards, to the extent that they are known, in all official actions relating to land use and control.

§ 1910.2 Minimum compliance with land management criteria.

(a) A flood-prone community which becomes eligible for sale of flood insurance prior to December 31, 1971, must have land use and control measures in effect by that date which at least meet the requirements of § 1910.3(a) in order to remain eligible after that date. In addition, the community must meet the respective requirements of § 1910.3 (b), (c), (d), or (e) within 6 months from the date it receives the data required for compliance with the applicable paragraph or by December 31, 1971, whichever is later.

(b) A flood-prone community applying for flood insurance eligibility after December 31, 1971, must meet the standards of § 1910.3(a) in order to become

eligible. Thereafter, the community will be given a period of 6 months from the date it receives the data set forth in § 1910.3 (b), (c), (d), or (e) in which to meet the requirements of the applicable paragraph.

(c) A mudslide-prone community which becomes eligible for sale of flood insurance prior to December 31, 1971, must have land use and control measures in effect by that date which meet the requirements of § 1910.4(a) to remain eligible after that date. In addition, the community must meet the requirements of § 1910.4(b) within 6 months after the date its mudslide areas having special mudslide hazards are delineated or by December 31, 1971, whichever is later.

(d) A mudslide-prone community applying for flood insurance eligibility after December 31, 1971, must meet the standards of § 1910.4(a) in order to become eligible for such insurance. Thereafter, the community will be given a period of 6 months from the date the mudslide areas having special mudslide hazards are delineated in which to meet the requirements of § 1910.4(b).

(e) Communities identified in Part 1915 of this subchapter as containing both flood plain areas having special flood hazards and mudslide areas having special mudslide hazards must adopt land use and control measures for each type of hazard consistent with the requirements of §§ 1910.3 and 1910.4.

(f) Local flood and mudslide land use and control measures should be submitted to the State coordinating agency designated pursuant to § 1910.25 for its advice and concurrence. The submission to the State should clearly describe proposed enforcement procedures.

(g) The community official responsible for submitting annual reports to the Administrator pursuant to § 1909.22(b)(2) of this subchapter shall also submit copies of each annual report to any State coordinating agency and to other appropriate State and local bodies, and shall inform the Administrator of the agencies to which the annual reports are sent.

§ 1910.3 Required land use and control measures for flood-prone areas.

The Administrator generally will provide the data upon which land use and control measures must be based. If the Administrator has not provided sufficient data to furnish a basis for these measures in a particular community, the community may initially use hydrologic

and other data obtained from other Federal or State agencies or from consulting services, pending receipt of data from the Administrator. However, when special hazard area designations and water surface elevations have been furnished by the Administrator, they shall apply. In all cases the minimum requirements governing the adequacy of the land use and control measures for flood-prone areas adopted by a particular community depend on the amount of technical data formally provided to the community by the Administrator. Minimum standards for communities are as follows:

(a) When the Administrator has not defined the special flood hazard areas within a community, has not provided water surface elevation data, and/or has not provided sufficient data to identify the floodway or coastal high hazard area, the community must—

(1) Require building permits for all proposed construction or other improvements in the community;

(2) Review all building permit applications for new construction or substantial improvements to determine whether proposed building sites will be reasonably safe from flooding. If a proposed building site is in a location that has a flood hazard, any proposed new construction or substantial improvement (including prefabricated and mobile homes) must (i) be designed (or modified) and anchored to prevent flotation, collapse, or lateral movement of the structure, (ii) use construction materials and utility equipment that are resistant to flood damage, and (iii) use construction methods and practices that will minimize flood damage;

(3) Review subdivision proposals and other proposed new developments to assure that (i) all such proposals are consistent with the need to minimize flood damage, (ii) all public utilities and facilities, such as sewer, gas, electrical, and water systems are located, elevated, and constructed to minimize or eliminate flood damage, and (iii) adequate drainage is provided so as to reduce exposure to flood hazards; and

(4) Require new or replacement water supply systems and/or sanitary sewage systems to be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, and require on-site waste disposal systems to be located so as to avoid impairment of them or

contamination from them during flooding.

(b) When the Administrator has identified the flood plain area having special flood hazards, but has produced neither water surface elevation data nor data sufficient to identify the floodway or coastal high hazard area, the minimum land use and control measures adopted by the community for the flood plain must—

(1) Take into account flood plain management programs, if any, already in effect in neighboring areas;

(2) Apply at a minimum to all areas identified by the Administrator as flood plain areas having special flood hazards;

(3) Provide that within the flood plain area having special flood hazards, the laws and ordinances concerning land use and control and other measures designed to reduce flood losses shall take precedence over any conflicting laws, ordinances, or codes;

(4) Require building permits for all proposed construction or other improvements in the flood plain area having special flood hazards;

(5) Review building permit applications for major repairs within the flood plain area having special flood hazards to determine that the proposed repair (i) uses construction materials and utility equipment that are resistant to flood damage, and (ii) uses construction methods and practices that will minimize flood damage;

(6) Review building permit applications for new construction or substantial improvements within the flood plain area having special flood hazards to assure that the proposed construction (including prefabricated and mobile homes) (i) is protected against flood damage, (ii) is designed (or modified) and anchored to prevent flotation, collapse or lateral movement of the structure, (iii) uses construction materials and utility equipment that are resistant to flood damage, and (iv) uses construction methods and practices that will minimize flood damage;

(7) Review subdivision proposals and other proposed new developments to assure that (i) all such proposals are consistent with the need to minimize flood damage, (ii) all public utilities and facilities, such as sewer, gas, electrical, and water systems are located, elevated, and constructed to minimize or eliminate flood damage, and (iii) adequate drain-

age is provided so as to reduce exposure to flood hazards; and

(8) Require new or replacement water supply systems and/or sanitary sewage systems to be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, and require on-site waste disposal systems to be located so as to avoid impairment of them or contamination from them during flooding.

(c) When the Administrator has identified the flood plain area having special flood hazards, and has provided water surface elevations for the 100-year flood, but has not provided data sufficient to identify the floodway or coastal high hazard area, the minimum land use and control measures adopted by the community for the flood plain must—

(1) Meet the requirements of paragraph (b) of this section;

(2) Require new construction or substantial improvements of residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood;

(3) Require new construction or substantial improvements of non-residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood or, together with attendant utility and sanitary facilities, to be floodproofed up to the level of the 100-year flood; and

(4) In riverine situations, provide that until a floodway has been designated, no use, including land fill, may be permitted within the flood plain area having special flood hazards unless the applicant for the land use has demonstrated that the proposed use, when combined with all other existing and anticipated uses, will not increase the water surface elevation of the 100-year flood more than 1 foot at any point.

(d) When the Administrator has identified the riverine flood plain area having special flood hazards, has provided water surface elevation data for the 100-year flood, and has provided floodway data, the land use and control measures adopted by the community for the flood plain must—

(1) Meet the requirements of paragraph (b) of this section;

(2) Require new construction or substantial improvements of residential structures within the area of special flood

hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood.

(3) Require new construction or substantial improvements of nonresidential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood or, together with attendant utility and sanitary facilities, to be floodproofed up to the level of the 100-year flood;

(4) Designate a floodway for passage of the water of the 100-year flood. The selection of the floodway shall be based on the principle that the area chosen for the floodway must be designed to carry the waters of the 100-year flood, without increasing the water surface elevation of that flood more than 1 foot at any point;

(5) Provide that existing nonconforming uses in the floodway shall not be expanded but may be modified, altered, or repaired to incorporate floodproofing measures, provided such measures do not raise the level of the 100-year flood; and

(6) Prohibit fill or encroachments within the designated floodway that would impair its ability to carry and discharge the waters resulting from the 100-year flood, except where the effect on flood heights is fully offset by stream improvements.

(e) When the Administrator has identified the coastal flood plain area having special flood hazards, has provided water surface elevation data for the 100-year flood, and has identified the coastal high hazard area, the land use and control measures adopted by the local government for the flood plain must—

(1) Meet the requirements of paragraph (b) of this section;

(2) Require new construction or substantial improvements of residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood;

(3) Require new construction or substantial improvements of nonresidential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood or, together with attendant utility and sanitary facilities, to be floodproofed up to the level of the 100-year flood;

(4) Provide that existing uses located on land below the elevation of the 100-year flood in the coastal high hazard area shall not be expanded; and

(5) Provide that no land below the level of the 100-year flood in a coastal high hazard area may be developed unless the new construction or substantial improvement (i) is located landward of the reach of the mean high tide, (ii) is elevated on adequately anchored piles or columns to a lowest floor level at or above the 100-year flood level and securely anchored to such piles or columns, and (iii) has no basement and has the space below the lowest floor free of obstructions so that the impact of abnormally high tides or wind-driven water is minimized.

[36 FR 24762, Dec. 22, 1971, as amended at 38 FR 1001, Jan. 8, 1973]

§ 1910.4 Required land use and control measures for mudslide areas.

The Administrator generally will provide the data upon which land use and control measures must be based. If the Administrator has not provided sufficient data to furnish a basis for these measures in a particular community, the community may initially use geologic and other data obtained from other Federal or State agencies or from consulting services, pending receipt of data from the Administrator. However, when special hazard area designations and other relevant technical data have been furnished by the Administrator, they shall apply. In all cases the minimum requirements governing the adequacy of the land use and control measures for mudslide-prone areas adopted by a particular community depend on the amount of technical data formally provided to the community by the Administrator. Minimum standards for communities are as follows:

(a) When the Administrator has determined that a community is subject to mudslides but has not yet identified any area within the community as an area having special mudslide hazards, the community must—

(1) Require the issuance of a permit for any excavation, grading, fill, or construction in the community; and

(2) Require review of each permit application to determine whether the proposed site and improvements will be reasonably safe from mudslides. If a proposed site and improvements are in a location that may have mudslide haz-

ards, a further review must be made by persons qualified in geology and soils engineering; and the proposed new construction, substantial improvement, or grading must (i) be adequately protected against mudslide damage and (ii) not aggravate the existing hazard.

(b) When the Administrator has delineated the mudslide areas having special mudslide hazards within a community, the community must (1) meet the requirements of paragraph (a) of this section and (2) adopt and enforce as a minimum within such area or areas the provisions of the 1970 edition of the Uniform Building Code, sections 7001 through 7006, and 7008 through 7015. The Uniform Building Code is published by the International Conference of Building Officials, 50 South Los Robles, Pasadena, CA 91101.

[36 FR 24762, Dec. 22, 1971, as amended at 38 FR 1001, Jan. 8, 1973]

§ 1910.5 Exceptions because of local conditions.

(a) The requirement that each community must have adopted adequate land use and control measures (consistent with the criteria set forth in this subpart) on or before December 31, 1971, is statutory and cannot be waived. However, the Administrator recognizes that exceptional local conditions may render the adoption of a 100-year flood standard or other standards contained in this subpart premature or uneconomic for a particular community. Consequently, to meet the December 31, 1971, statutory deadline, a community may elect standards of protection which do not fully meet the requirements of § 1910.3 or § 1910.4, subject to the provisions of this section.

(b) All local land use and control measures intended to meet the requirements of this subpart shall be submitted to the Administrator after their adoption. If the adopted ordinances appear to reflect compliance with the requirements of this subpart, they will initially be accepted by the Administrator (without detailed examination) in satisfaction of such requirements, and the sale of flood insurance will be continued or approved for the community submitting them. If the Administrator subsequently determines that the adopted land use and control measures are inadequate, either in general or in some particular aspect, he may require their modification within a specified period of time to meet the requirements of this subpart as a condi-

June 2, 1976

Hon. Jack Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Re: Ruth Fadow and Seymour Fadow
vs. Messers. Grenito, Peterson,
et al
Answer to Motion for Summary
Judgment - Civil Index #75C638

Dear Sir:

In regard to the above matter, the genuine issue is my right to life under the 5th and 14th Amendments of the U.S. Constitution. The 5th Amendment is, no person shall be deprived of life, liberty or property without due process of law. The 14th Amendment is, nor shall any State deprive any person of life, liberty or property without due process of law.

A vital important Federal issue that I stressed at the Board of Zoning Appeals hearing, which was ~~signed~~ *ignored* by The Board of Zoning Appeals and the State Judge was that my life will be endangered as well as others similarly situated if this building is constructed in a high risk zone so as to add this increased all year round density of population, impeding evacuation from this narrow island. Our only exit is a mechanical bridge which has at times gotten stuck after being opened. Long Beach to the East has two bridges leaving the island. In 1938 and 1944 cars, buses, trains were inoperable during the hurricanes. All three bridges are in a flood plain area as identified by the United States Army Corps of Engineers. Tidal Flood Plain Information, South Shore of Nassau County, Long Island, New York, Prepared by Department of The Army, New York District, Corps of Engineers for County of Nassau Planning Commission, June 1971.

The subject property is not merely in a flood plain, it is in a special high risk area, the exposed waterfront. This differs from my home and other homes to the north of the subject property. Property in the exposed waterfront is exposed to most severe elements, wave action. People in this exposed waterfront area would have to be evacuated first because it is the more dangerous high risk area.

June 2, 1976

The New York Times voiced concern about loss of life in flood areas - Page 34, April 27, 1976 Editorial.

The papers submitted by the Town Attorney do not show that there is a different category for high risk areas (exposed ocean front areas). The papers submitted do not include the declared purposes of Congress which resulted in a change in policy from protective works to reducing threat of damage to property and reducing threat to life through proper land planning.

The Flood Insurance Program is not a Legislative Act. The regulations are drawn pursuant to various acts of Congress. It does on page 741 note coastal high hazard areas - "special flood hazards that is subject to high velocity waters, including hurricane wave wash". (Emphasis supplied)

The Army Corps of Engineers 1963 have identified the petitioners property as having "special flood hazards," pounding of waves.

What measures P. 746 (note pages 742-745 omitted), did the Town adopt to prevent erection of new residential buildings on exposed waterfront property? Hud apparently required no such prohibition. Does not such failure on the part of Hud violate the purposes of Congress? What "measures" were submitted to Hud? (by Jan. 15, 1972). The State Judge does not mention such compliance. P. 747 states that the Administration generally will provide the data upon which land use and control measures must be based. Why generally for Atlantic Beach when Army Engineers have defined "exposed waterfront" property as having "special flood hazards"?

Why did the Board of Zoning Appeals disregard Army Corps of Engineers report made part of the Public Records, including damage to life during evacuation? P. 747 states "The community may initially use hydrologic and other data obtained from other Federal Agencies. Why not the Army Corps of Engineers data?

By P. 748 (a) has the administration failed to define special "flood hazard areas" - but has defined all of Atlantic Beach as a "flood prone area"?

FEDERAL QUESTIONS

1. Has the Town of Hempstead complied with the Congressional purposes (declared purposes) of the F.I.A. and the Flood Disaster Protection Act?

June 2, 1976

2. Has the Secretary of Hud complied with the Congressional directive to give the highest practicable priority to the identification and mapping of flood-risk zones. Sec. 204 (c) of the Flood Disaster Protection Act of 1973, Section 1360 of the National Flood Insurance Act of 1968 amended. "The Secretary is directed to accelerate the identification of risk zones within flood prone and mud slide-prone areas, as provided by subsection (a) (2) of this section in order to make known the degree of hazard within such zone at the earliest possible date. To accomplish this objective, the Secretary is authorized, without regard to section 3643 and 3709 of the Revised Statutes, as amended (31 U.S.C. 529 and 41 U.S.C.S.) to make grants, provide technical agreements, or other transactions, on such terms as he may deem appropriate, or consent to modifications thereof, and to make advance or progress payments in connection therewith" "(c) The Secretary of Defense (through the Army Corps of Engineers".

3. Has the Secretary of Defense complied with the congressional directive to give its information to Hud. (either the Secretary of Defense has given its information to Hud and Hud hasn't used it, or it has not given it to Hud. The Secretary of Defense has had this information about high risk areas since 1955. "and the heads of all other Federal Agencies engaged in the identification or delineation of flood-risk zones within the several states - shall in consultation with the Secretary, give the highest practicable priority in the allocation of available manpower and other available resources (emphasis supplied) to the identification and mapping of flood hazard areas and flood risk zones (emphasis supplied) in order to assist the Secretary to meet the deadline established by this section." As amended Pub. L. 93-234, Title 11 204 Dec. 31, 1973, 87 Stat 983.

I ask this Federal Court for strict scrutiny and interpretation of the statute in order to determine whether the Secretary of Defense and Hud have fully complied with the declared purposes, mandates and directives of Congress in the enactment of the Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973.

In asking for what appears at first glance to be merely a "zoning case", I am actually asking to be heard as a United States citizen protecting her constitutional rights to life under the 5th and 14th Amendments. In the case of *Lerner v. Town of Islip* (Aug. 10, 1967) the District Court, Weinstein, J., this was "an action by property owner for judgment declaring that applicable Town zoning ordinance violated her rights under the 5th and 14th

Hon. Jack Weinstein

-4-

June 2, 1976

amendments to the United States Constitution.

The District Court, Weinstein, J. held that doctrine of abstention was not applicable and did not preclude Federal District Court from determining whether application of Team Zoning Ordinance violated property owners' rights under the 5th and 14th Amendments to the Federal Constitution. The motion to dismiss was denied.

Under the 5th and 14th Amendments, I ask in my case that the motion to dismiss be denied.

Very truly yours,

Ruth S. Padow
Seymour Padow

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

RUTH STELLA RADOW, :

Plaintiff, :

- against - :

75-C-638

GRANITO, et al., :

Defendants. :

- - - - - x

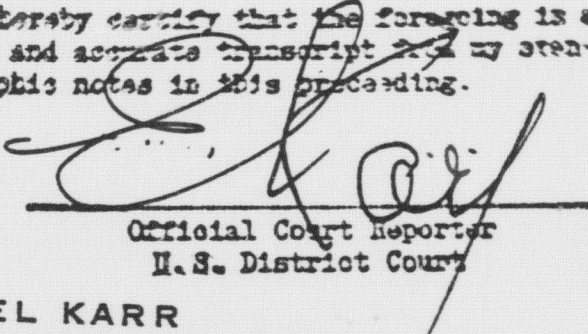
United States Courthouse
Brooklyn, New York

May 12, 1976
9:20 o'clock a.m.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

I hereby certify that the foregoing is a
true and accurate transcript of my sten-
ographic notes in this proceeding.


Official Court Reporter
U.S. District Court

EMANUEL KARR

OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
FEDERAL COURT HOUSE, ROOM 302
225 CADMAN PLAZA EAST
BROOKLYN, N. Y. 11201

TEL. ULSTER 2-7105, 7106, 7107

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A p p e a r a n c e s :

RUTH STELLA RADOW,
Pro Se

SEYMOUR RADOW,
Pro Se

W. KENNETH CHAVE, JR.,
Town Attorney

BY: JEFFREY L. STADLER, ESQ.,
Assistant Town Attorney

ck/s3

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THE COURT: All right, call the case.

THE CLERK: Radow versus Granito.

THE COURT: You are Ruth Radow, are you?

MRS. RADOW: Yes, your Honor.

THE COURT: You are appearing without counsel.
Are you prepared to testify in this case.

MRS. RADOW: Yes, sir.

THE COURT: Swear the witness.

MRS. RADOW: I am a little confused now. As I
understood it we came without counsel because we
understood we were having a conference.

THE COURT: Are you going to have counsel.

MRS. RADOW: We had expected to have counsel in
the future.

THE COURT: Well --

MRS. RADOW: Have I done something wrong by what
I just answered to you?

THE COURT: No.

I am prepared to try the case now.

Do you want time for counsel?

MRS. RADOW: Yes, please.

THE COURT: You want an adjournment of the case?

MRS. RADOW: Yes.

May I say I didn't realize that, I thought it
was just a conference to find out whether we wish to go

71

1 ahead and then we would obtain counsel, that is what --

2 THE COURT: I see.

3 All right, we will set it down for trial.

4 MRS. RADOW: Oh, thank you, sir.

5 THE COURT: We are going to have a very brief
6 trial.

7 I don't believe under the facts as I have heard
8 them informally and off the record and after examining
9 the statutes as I have just read it that you are going
10 to be entitled to any relief here.

11 I don't believe there is sufficient threat to
12 your flood insurance to warrant intervention by the
13 Court.

14 Based upon the documents that I have read,
15 particularly the opinion from the State Supreme Court,
16 it seems evident to me that what is involved here
17 really is an attempt to challenge the rezoning, and
18 that is entirely justifiable under the circumstances,
19 but we cannot convert, in the Federal Court, what is
20 essentially a zoning case and which has already been
21 lost in the State Court into another litigation in the
22 Federal Court on the far-fetched theory that your
23 insurance may be cancelled.

24 I don't believe there is any basis in fact for
25 believing that there is any risk of cancellation of

72

1 insurance based upon this building. The town of
2 Hempstead has adopted regulations in accordance with the
3 statute and insurance has been issued. Now 4022 makes
4 it clear that no new flood insurance shall be provided,
5 but there is no suggestion at all here that anyone is
6 going to cancel your present insurance.

7 With all due respect, I believe this is just an
8 excuse for challenging the zoning.

9 I don't criticize you --

10 MRS. RADOW: That is not our reason, no, sir,
11 that is not what we --

12 THE COURT: I understand your position and I
13 am sympathetic to homeowners since I am one myself, but
14 I don't believe that there is a justiciable cause of
15 action within the Constitution permitting this Federal
16 Court to take jurisdiction.

17 Essentially you have lost your case in the State
18 Court and you can take an appeal from Judge Suozzi's
19 opinion.

20 MRS. RADOW: We feel that there are federal
21 questions, we feel they can only be determined here

22 THE COURT: I don't agree with you.

23 You are free to get your own lawyer.

24 I don't want to suggest what you should do.

25 If you want time, of course I will give you time

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1 MRS. RADOW: Yes, please, sir.

2 THE COURT: I am prepared to go ahead and try it
3 right now, and then if I decide it adversely, you can
4 take an appeal.

5 If you want time, how much time do you want?

6 MRS. RADOW: Just a few weeks, we are talking to
7 an environmental attorney and we are making an
8 appointment with him.

9 THE COURT: Do you want to set it down for trial
10 Is there a motion for summary judgment?

11 MR. STADLER: Your Honor, I recall that on
12 June 27, 1975 we moved both defendants, the attorney
13 for the Defendant Fourth Ocean Putnam Corporation and
14 the town attorney on behalf of the Board of Zoning
15 Appeals, both Michael Ricigli and myself moved to
16 dismiss for lack of jurisdiction.

17 THE COURT: I denied it.

18 MR. STADLER: That is correct.

19 THE COURT: You never made a summary judgment
20 motion.

21 MR. STADLER: That is correct, we have no
22 summary judgment motion, and you denied it on the
23 grounds that it should proceed to the State Courts.

24 At this point, if the Court would honor a motion
25 for summary judgment to dismiss, I would so move to

74

1 that effect.

2 THE COURT: I won't, I'm not going to take the
3 whole motion.

4 You may make a return motion on behalf of the
5 parties.

6 MR. STADLER: I will do that on the return day.

7 THE COURT: How much time do you want?

8 MRS. RADOW: Just a few weeks.

9 THE COURT: Well, make your motion for summary
10 judgment returnable -- well, give me a date you want.

11 You had better have an attorney here.

12 MRS. RADOW: I'm sorry we haven't an attorney.

13 Can we ask for an adjournment if the attorney
14 can't make it.

15 THE COURT: I will be glad to do that.

16 MRS. RADOW: Then can we be heard.

17 THE COURT: Yes.

18 MRS. RADOW: I thought we would be heard, I
19 have brought in all of my papers on it.

20 THE COURT: That is all right, that is quite all
21 right.

22 You have handled yourself very well.

23 MR. STADLER: I may say that they were partially
24 successful in the State Supreme Court in that Justice
25 Suozzi ruled that the Board of Zoning Appeals did not

1 have the power to grant certain relief so the decision
2 will have to be appealed in part. But they lost in the
3 main use, they lost the flood insurance question.

4 THE COURT: *Not the ONLY question*
Can you get your papers returnable
5 by June 2nd?

6 The motion for summary judgment will be heard
7 on June 2nd. If you don't want to go forward with it -

8 MRS. RADOW: We will go forward, sir.

9 THE COURT: (Continuing) -- you may call on the
10 telephone.

11 All right.

12 Thank you for coming in.

13 9:30 on June 2nd.

14 I want you to order a copy of the minutes and
15 supply a copy at the expense of the Town to the
16 plaintiffs.

17 MR. STADLER: Yes, your Honor.

18 * * *

10175A

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4

5 R. RADOW, :

6 Plaintiff, :

75-C-638

7 -against- :

8 MESSRS. GRENITO and PETERSON, :

9 Defendants. :

10
11
12 United States Courthouse
13 June 2, 1976
14

15 B e f o r e :

16 HONORABLE JACK B. WEINSTEIN, U.S.D.J.
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22

23 MICHAEL MIELE
24 OFFICIAL COURT REPORTER
25

Appearances:

RUTH RADOW
SEYMOUR RADOW

1
2 THE COURT: Have the Plaintiffs obtained an
3 attorney pursuant to my suggestion, at the last hearing?

4 MR. SEYMOUR RADOW: No, sir.

5 THE COURT: Do you have any witnesses that you
6 would like to present or other material?

7 MR. SEYMOUR RADOW: In answer to the summary
8 judgment --

9 THE COURT: You were to submit all of this
10 material.

11 MR. SEYMOUR RADOW: It is just for the summary
12 judgment.

13 THE COURT: It is a letter dated June 2nd and
14 mark this as Plaintiff's Exhibit 1.

15 This is from the New York Times dated May 30th
16 and mark that Plaintiff's Exhibit 2.

17 There is a letter from the New York Times, an
18 editorial from the New York Times dated June 2, 1976.
19 Mark this Plaintiff's Exhibit 3.

20 A booklet entitled Plan Information for the
21 South Shore County prepared by the Department of Army,
22 June 1971.

23 Mark this Plaintiff's Exhibit.

24 This is a document dated January 10, 1973 from
25 the Department of the Army. Mark this Plaintiff's

79

1 exhibit.

2 Do you have any witnesses you want to present,
3 Mrs. Radow?

4 MRS. RUTH RADOW: Yes, Mr. Morris Kramer.

5 M O R R I S H . K R A M E R , having been first
6 duly sworn, testified as follows:

7 THE WITNESS: I am an environmental analyst.

8 I write a weekly newspaper column on Long Island.
9 I write on environmental subjects. I have written on
10 the subject of salt water intrusion and Long Island
11 fresh water supply. I have been nominated for national
12 internal award by the State Senator Berkstein, and I
13 have been involved in environmental issues that affect
14 my living in Atlantic Beach adversely.

15 I have been studying the problem of salt water
16 and Long Island fresh water supply for a number of years.

17 This involves reading water well applications by
18 the Long Island Water Company, Jamaica Water Company.
19 Problems have affected the communities, your Honor.

20 Problems of New York State in obtaining additional
21 water which is a federal case right now have been
22 studied and hurricanes and floods and a number of other
23 matters.

24 I would like to point out that in a hearing
25 before the Town Board of Hempstead in March 20, 1973,

1
2 the petition of Capri Estates, Inc., which is a half a
3 mile from this pending case, that I testified to, and
4 they are in pretty much along the same line and the
5 presiding supervisor, Francis Purcell complimented my
6 testimony and asked me if I was in an engineer. I
7 would like to offer that for the record.

8 THE COURT: Mark it as a Plaintiff's exhibit.

9 THE WITNESS: I gave a substantial statement at
10 the original hearing before the Zoning Board of Appeals
11 before Putnam Corporation with supporting documentation.

12 THE COURT: You testified in the Capri case?

13 THE WITNESS: And in this case.

14 THE COURT: In the Capri case, what were they
15 asking for? Rezoning for a hotel?

16 THE WITNESS: 400 condominium units.

17 I used salt water instructions and fresh water
18 supply and flood --

19 THE COURT: What happened in the Capri case?

20 THE WITNESS: The petition was denied in all
21 respects.

22 THE COURT: Based on your testimony?

23 THE WITNESS: Yes, and Radow's testimony.

24 THE COURT: And then you testified in this
25 particular case?

81

1
2 THE WITNESS: Yes.

3 THE COURT: The Board of Zoning Appeals, is that
4 what it is, did not accept your view in this particular
5 case that we have before us?

6 THE WITNESS: Not only that, but they totally
7 left some aspects and didn't address the issues.

8 THE COURT: Wasn't there a suit then brought in
9 the state court challenging the Board of Appeals on the
10 ground they left all this out and hadn't satisfactorily
11 covered it?

12 THE WITNESS: I would say that part of the suit --

13 MRS. RADOW: The suit was brought and this is
14 one of the points that was brought in and this again was
15 not looked into by the state.

16 MR. RADOW: It was ignored.

17 THE COURT: You appealed before the Appellate
18 Division?

19 MR. RADOW: We didn't appeal any part of it.
20 There is a neighbor, a Mr. Brady who initiated Article 78
21 and he just ran out of funds.

22 THE COURT: He didn't take an appeal?

23 MR. RADOW: No.

24 THE COURT: All right.

25 THE WITNESS: I have been a United States citizen

1
2 and a resident of the community for thirty years.

3 In my opinion, the decision violates the Fifth
4 and Fourteenth Amendment, depriving of life or property.

5 THE COURT: Why didn't you intervene in
6 the state proceeding and bring that to the attention of
7 the state court which has the same obligation of any
8 court to enforce the Constitution and federal statutes?

9 THE WITNESS: Because I feel these are federal
10 matters. We are talking about a federal flood insurance
11 law and you are better able to interpret the United
12 States Constitution than the State, or the constitution-
13 ality of the United States laws, common law doctrine that
14 came into being before we had a Constitution or statutes
15 and that was ignored and the water supply on Long Island
16 is already in the United States Supreme Court, the
17 Delaware Act for many years. The Supreme Court held that
18 was open for further adjudication. These are federal
19 problems and not state problems.

20 THE COURT: But we don't have -- I notice in this
21 letter of June 2nd the questions raised are primarily
22 whether the Secretary of Flood Supplied with
23 Congressional directives and the Secretary of Defense,
24 complied with Congressional directives and we do not have
25 as parties to this suit any of these people who claimed

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2 they did not do what they were supposed to do. The only
3 ones that were parties are the members of the Board of
4 Zoning Appeal.

5 Isn't that right?

6 MRS. RADOW: In our original brief we do bring up
7 the problem of salt water intrusion. That is why I had
8 the witness come in and speak on it.

9 THE COURT: Try to be brief because I have this
10 criminal case coming up, but I will be glad to hear you.

11 I am familiar generally with the studies made
12 over the years with respect to salt water intrusion and
13 the problems of supplying fresh water, particularly in
14 Nassau County and the construction problem on the South
15 Shore which will undoubtedly be aggravated by the
16 increased use of sewerage, taking some of the fresh water
17 supply and running it out to sea.

18 This has been a long going problem. The County
19 has conducted a considerable amount of engineering
20 studies.

21 THE WITNESS: Right, sir.

22 The matter is a temporary Water State Commission
23 one and it is an expert committee and they did research
24 for years and they have concluded that the water supply
25 situation in Nassau is at a crucial point.

Kramer-direct

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2 THE COURT: We are all aware of that.

3
4 Their problem is in trying to get some of the
5 Suffolk water supply.

6 I know the County Executive of Suffolk has always
7 taken a position that they won't permit any Nassau water
8 to be used, Nassau consumers, and there is also a
9 problem of getting city water.

10 Nassau County has intervened in connection with
11 the new tunnel.

12 THE WITNESS: This is a letter to the County
13 Executive -- rather, from the County Executive to Mayor
14 Beame asking to keep the project alive.

15 THE COURT: Mark this, please.

16 THE WITNESS: The County Executive testified
17 before the Army Corps of Engineers and asked for
18 federal funds to keep that project alive. That we cannot
19 make on our own and the City refuses to go along with
20 the tunnel unless they get federal funds.

21 The problem is where the water --

22 THE COURT: I understand the problems are
23 enormous. I know about these studies. I participated
24 in obtaining some of the original grants used for
25 getting these studies made.

THE WITNESS: I can bring that up in two short

the Port Washington Peninsula.

This is not a problem to your waterfront property.

THE WITNESS: It is peculiar and critical in that for instance a movie theater up by Rockville Centre, on Sunrise Highway, the State Department Environmental Conservation just authorized them to take water out of the Magathe Aquava for air conditioning purposes which they must return to that exact portion of land.

THE COURT: Is the Nassau County -- well, Nassau County is also experimenting with the injection of certain treated water, sir.

THE WITNESS: At Sure Creek, which is federally financed.

THE COURT: We are all aware of this problem. I cannot deal with that kind of complex problem in an action by two property owners against the members of the Board of Zoning.

It is a complicated governmental problem that involves at the very least the County of Nassau, Suffolk, New York, Town of Hempstead, the City of Long Beach, and a half-dozen private water counties and all of the villages and all of the towns and maybe other entities plus the federal government and the Department of the Army and HUD and HEW.

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2 This is a case where you come here without
3 counsel in the most complicated kind of a case without
4 the proper party.

5 You have had a chance to litigate it in the state
6 court and you haven't moved forward with that litigation.

7 I simply cannot handle it on this informal basis
8 and I do not say that out of disrespect to you as an
9 expert.

10 I appreciate what you and the Radows have done,
11 but I am not in the position to handle it.

12 I won't handle a case with so many governmental
13 entities without having the critical party before me.

14 THE WITNESS: You have handled a critical case of
15 mine before where I was a plaintiff, Kramer v. Union
16 Free School District, upon which you issued a 23-page
17 dissent. I thank you for that decision.

18 You enunciated the one-man one-vote doctrine.
19 You went against the New York State --

20 THE COURT: This is a much more complicated case.
21 I do not have the parties before me who are critical to
22 this case. I don't have the United States Government,
23 the County of Nassau and I do not have any of the people
24 here.

25 THE WITNESS: Do we kill a case by ignoring it,

1
2 such as Nassau or the Town of Hempstead has done in not
3 showing up?

4 THE COURT: It is partly a political problem, even
5 more than a court problem.

6 THE WITNESS: Do we have a right to drink a glass
7 of water?

8 Do we have a right to live free of fear of flood?

9 Do we have a doctrine of use publicum, to walk
10 along the beach without having --

11 THE COURT: I understand all that and I am very
12 sympathetic.

13 THE WITNESS: The state and the local counties
14 ignored it.

15 There is a basic conflict here. We have an
16 initial right.

17 THE COURT: I cannot handle this kind of a case
18 which is so enormously complex without having a truly
19 adversarial proceeding involving the parties who are
20 really in interest.

21 I do not have the parties in real interest
22 before me. The Board of Zoning Appeal is the least
23 people involved here. They do not have any authority
24 with respect to water or shutting down buildings or
25 anything else. It is obviously an environmental problem.

They rejected applications along these lines, so they have the authority.

THE COURT: I certainly cannot on the basis of the papers before me in effect on the water problem put a stop on all construction in the southeast area of Nassau on these papers.

It would be just intolerable.

We are talking about one application.

THE COURT: The same principle that would permit me from preventing this type of building would require me to stop all building in the southeast Nassau portion. I do not say that should not happen.

THE WITNESS: I am talking about a two-mile strip, most critical strip on all Long Island.

I am not talking about all Long Island.

The City of Long Beach, in an April 6 report, Long Beach has a building moratorium up to two stories. They draw from different aquas, from use and they can cut off --

THE COURT: If they cut off your water you are in a serious situation.

THE WITNESS: If they run out of water they will need our water.

THE COURT: No question about it.

1
2 You are in serious trouble.

3 I do not deny the fact that there is a substan-
4 tial problem and I am sympathetic with it.

5 THE WITNESS: What is required to have all the
6 parties here?

7 THE COURT: I think you will have to consult an
8 environmental attorney and if you are going to have a
9 suit, do it properly. This is way above your depth.

10 This is one of the most complicated cases ever
11 brought. I cannot be your attorney and do all your
12 research.

13 The Kramer case compared to this is a country
14 kindergarten size.

15 MRS. RADOW: I have something I wanted to read
16 into the record.

17 THE COURT: I cannot have you read it into the
18 record. If you have a statement, mark it and I will
19 read it.

20 I will give you time to submit it.

21 MRS. RADOW: Fine.

22 MR. RADOW: Regarding the statements, it is
23 a monumental case and how -- well, we have attempted
24 to get the environmental group together and once that
25 I get in touch with them, the ones that I contributed

16
1 to and I feel they have an obligation to me, and even
2 they are afraid to take it because it is too much to
3 handle financially.

4 We attempted to get a friend to get someone to
5 write on the flood act to testify and when you get
6 someone on the phone it is a monumental task to do. I
7 never spoke to him. It is a secretary and then another
8 secretary and nobody seems to want to talk. If you say,
9 we will pay you a fee of \$1,000 to show up for a day
10 they show that one isn't enough. You need ten of them.

11 Most of the attorneys, the ones we know, are too
12 busy with divorce cases and that sort of thing.

13 MRS. RADOW: We spoke to an environmental attorney
14 and he said I could ask for an adjournment but I must
15 explain what his stipulation was, that he not be called
16 for this case, to consider this case until after the end
17 of June.

18 THE COURT: I will put it over until September.

19 MRS. RADOW: He wouldn't allow me to use his name.
20 Is that satisfactory?

21 THE COURT: I will put it over to September.
22 As it stands now I cannot with my limited resources in
23 effect put together a case and try it in this fashion.
24 That is not the way the court works.

25 It is not going to be very much help, with all

1 due respect, sir. You are faced with a difficult
2 problem of res judicata because of the appeal in the
3 state court of the Board's decision.

4 MRS. RADOW: That is a different party and not
5 handling federal law but state matters. We went into
6 different questions before the Town Board. When we
7 went to the Board of Appeals they suggested that we go
8 before the federal court.

9 We went under the 14th Amendment.

10 THE COURT: I will give you until September,
11 if you want it. I am not going to try to cut your
12 rights off. I want to give you a full opportunity. I
13 am not going to let the case proceed in this way.

14 That would be --

15 MRS. RADOW: That is very fair.

16 THE COURT: In September, unless the case
17 changes its posture completely it is going to be
18 dismissed then. You can take it up to the Court of
19 Appeals at that time, the Second Circuit who is very
20 sympathetic on environmental cases. They have written
21 landmark decisions in connection with the Hudson River
22 and other cases. It may well be they will send it back
23 and say I have to try it on this record and this
24 posture and I will be happy to do what they tell me to
25 do. As it stands now I won't do it. This would mean

1 I would have to be your lawyer and the lawyer for the
2 Zoning Board and the lawyer for people not here, HUD and
3 the engineers, the County of Nassau, the State which has
4 authority in this area. The real parties in interest
5 are not before us.

6 MR. RADOW: As far as the Army Corps of Engineers
7 there is in planning an area --

8 THE COURT: Anybody who has lived in that area
9 and knows what the situation is and has had any
10 opportunity or responsibility, knows what the problems
11 are. There is a problem on the whole beach area with
12 respect to hurricanes and serious salt water intrusion
13 problems on the southwest of Nassau County, and there is
14 a serious problem of the exhaustion of the aqua portion
15 under the whole of Nassau County and even Western
16 Suffolk. Nobody knows how much water is under there.

17 I cannot solve the problems of the world with
18 this one case, particularly in the posture it is in.
19 I think you have a serious political problem but whether
20 you have a judicial one --

21 MR. RADOW: That political problem is what is
22 preventing us from obtaining a good lawyer, if you know
23 what I mean.

24 THE COURT: I do not know what you mean. I
25 cannot do anything at the moment. I will give you until

1 September 28th in the posture as it is now and I will
2 have no alternative but to dismiss it if it is in the
3 same posture. Give me a full typewritten statement and
4 attach anything you want and put it all together in the
5 record. If you want to take an appeal to the Court of
6 Appeals do so and maybe you can get them to say we
7 should take it.

8 Until September 28, write up whatever kind of
9 statement you want and attach all reports and documents
10 you want and put it in. You must send a copy of it to
11 the Town of Hempstead.

12 Would you inform the Town of Hempstead that I
13 want them here on September 28th at 9:30.

14 THE CLERK: I spoke to them and they say they did
15 not get the answering papers and did not appear.

16 THE COURT: Tell them I want them here September 28
17 Adjourned until September 28th.

18 I do not want you to give me anything except in
19 open court before a Court Reporter.

20 My Law Clerk will call the Town of Hempstead and
21 ask them to order a copy of this transcript and the
22 prior hearing and that will be in the record.

23 MR. RADOW: The prior hearing we have.

24 MRS. RADOW: I have a report for them. I will
25 type up this and I will still submit this now and will

1
2 give them a copy but do I save this for September?

3 the court; Whatever you want to do. You may
4 want to think about it before you put it into the final
5 form. After consulting a lawyer you may decide what
6 you have said in it isn't the right thing to say.

7 MR. RADOW: Is September 28 one of the holidays,
8 Jewish holidays?

9 THE COURT: No.

10
11 * * *

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 x
5 RUTH RADOW and SEYMOUR RADOW, :

6 Plaintiffs, :

7 - against - :

8 MESSRS. GRENITO, PETERSON, TRAPANT, :

9 WALKER, ROSE YACHNIN and WEXNER, :

75-C-638

10 Constituting the Board of Zoning :

Appeals of the Town of Hempstead, :

11 State of New York, and THE FOURTH :

OCEAN PUTNAM CORPORATION, and :

THE TOWN OF HEMPSTEAD, :

12 Defendants. :

13 x
14

15 United States Courthouse
16 Brooklyn, New York

SEPT 28, 1970

17
18
19 I hereby certify
20 true and
21 correct

Daniel D. Simon

22
23 DANIEL D. SIMON
24 ACTING OFFICIAL COURT REPORTER
25

Appearances:

RUTH RADOW, In Person

SEYMOUR RADOW, In Person

MORRIS KRAMER, In Person

JEFFREY L. STADLER, ESQ.

Deputy Town Attorney

of the

Town of Hempstead

Town Hall

Hempstead, New York 11550

1 THE COURT: Well, Mr. and Mrs. Radow, do you
2 remember the last time you were here I suggested you
3 get an attorney because I told you that I didn't think
4 you or your adviser, Morris Kramer, were competent to
5 handle these technical problems. I gave you an exten-
6 sive adjournment on the argument of the motion in
7 order to permit you to obtain counsel.

8 I take it you have been unable to obtain coun-
9 sel.

10 MS. RADOW: What I did, sir, is on September
11 10 -- on or about September 10 I called your clerk and
12 I explained to him that I was unable to obtain an
13 environmental attorney because of costs and I asked
14 him if we could come in pro se.

15 I asked him if you could give us permission to
16 subpoena because I felt we had the case set up at that
17 point in the posture to be heard according to your
18 minutes of June 2nd. And the clerk said rather than
19 give me a -- rather than to do it that way he said I
20 must make a motion for the Court to appoint an attor-
21 ney. This was not my request. This is what the clerk
22 told me to do. And I did so.

23 THE COURT: Well, I indicated in my memorandum
24 and order of September 21 that I could not assign
25 counsel.

99

1 MS. RADOW: Yes sir, I understand that. Had I
2 realized that you could not assign counsel I would not
3 have exposed my finances. I would not have spent that
4 time in even making the motion. I realize that this
5 might be a court procedure, but my actual point was to
6 see if we could come in pro se.

7 THE COURT: Well, you can. I am delighted to
8 hear you pro se. You are entitled to be here as a
9 citizen.

10 This is a motion --

11 MR. STADLER: For summary judgment.

12 THE COURT: By the Town?

13 MR. STADLER: By the Town, Board of Zoning
14 Appeals of the Town of Hempstead.

15 THE COURT: All right, I will hear the Town and
16 then you can respond.

17 MR. STADLER: Your Honor, we make this motion
18 to dismiss the cause of action on the grounds that the
19 statements set forth in the complaint do not consti-
20 tute a cause of action.

21 Furthermore that the matter has been heard and
22 determined in New York State Supreme Court before
23 Justice Suozzi of the Supreme Court.

24 Furthermore that the Town of Hempstead has done
25 nothing to violate the flood insurance regulations set

1 up by the United States Government, and that the Town
2 of Hempstead cooperates as the responsible locality in
3 the issuing of building permits for new construction.

4 Mr. William L. Williams, who is seated at my
5 left, whose supporting affidavit on behalf of the
6 motion that has been made is here today to give fur-
7 ther testimony. He is the responsible Building Depart-
8 ment official who reviews applications to determine
9 compliance with the Federal regulations. And he has
10 advised me and he will so advise the Court if neces-
11 sary, that there is nothing in the Federal regulations
12 that prohibits the construction, but the Federal regu-
13 lations govern construction so that the adjoining
14 property owners will be protected should new construc-
15 tion be made within flood areas. And for that point,
16 we believe that the claim of the plaintiffs that the
17 construction of a new hotel in place of an existing
18 hotel would impede or in any way hinder their right to
19 obtain Federal Flood Insurance, we state that that
20 claim is without merit, and there has been no proof.
21 If they wanted to bring in a representative of the
22 insurance agency, and I believe it is Great American,
23 which handles flood insurance in the State of New York,
24 to testify that they have a possibility of losing
25 their flood insurance by the erection of a new hotel,

1 I would be most surprised of such testimony because the
2 Town would not want it to harm any property owners
3 by allowing the new construction of any such type
4 facility.

5 Mr. Williams, if you would like him to make a
6 statement, he has analyzed the National Flood Insur-
7 ance. We have met since 1971 with the Federal Flood
8 Insurance officials. And we have a program implemented
9 to carry out the benefits of the Act. It is a pro-
10 tective Act for people. I would think that a new
11 hotel would have greater flood protection rather than
12 an old existing hotel which came into existence prior
13 to the Act. And furthermore that any construction
14 would be geared to aid a community rather than to
15 hinder it.

16 Bill, would you like to make a statement?

17 MR. WILLIAMS: Well, basically the --

18 THE COURT: Excuse me, Mr. Williams, are you
19 going to say anything that isn't in your affidavit?

20 MR. WILLIAMS: No sir.

21 THE COURT: All right, then we will take the
22 affidavit.

23 MR. WILLIAMS: Thank you.

24 MR. STADLER: Fine.

25 MS. RADOW: We have papers that we would like

1 to submit. We set everything up so that what is in
2 the Court record pertaining to the flood is in these
3 papers that we want to submit, cutting away from the
4 fat from the whole entire -- from the submissions, you
5 know, before the Board of Zoning Appeals, and are just
6 specifically on the flood insurance --

7 THE COURT: Well, are these materials before
8 the board?

9 MS. RADOW: Yes, these were before the Board.
10 And I believe that you have them. But they are put
11 together now so that --

12 THE COURT: Didn't Judge Suozzi have those
13 materials on the Appeal?

14 MR. STADLER: Yes.

15 MS. RADOW: Judge Suozzi had these -- Judge
16 Suozzi had -- it was a different party. What is being
17 stressed here is not being stressed there. He is in
18 the State Court and he can't rule, as far as I under-
19 stand, on a Federal question.

20 THE COURT: That's not true.

21 MR. RADOW: The minutes say that Judge Suozzi
22 completely refused to rule on flood insurance --

23 MS. RADOW: And what we --

24 MR. RADOW: -- and the Act and everything to
25 do with the Federal Government. He absolved himself

1 from it in the minutes.

2 MS. RADOW: We feel there are two agencies that
3 control the zoning, one is the Town and one is the
4 Federal Government, and we are saying that both are
5 in this and that the Town has placed this hotel in the
6 same category as other buildings in the flood area.
7 This is the area that is exposed to the ocean front,
8 exposed to the pounding waves, and the difference
9 between this hotel and the one that it may replace,
10 which is three blocks over, not on the same site, is
11 that this hotel has 70 more people.

12 And the weather service, Nassau County Planning
13 Service, the State of New York Environmental and Con-
14 servation, and the Army Corps of Engineers all have
15 shown concern about this barrier beach, Long Beach
16 Island, and they have prepared all documents which
17 have been put into the records showing that it is
18 a high hazzard area, particularly the exposed ocean
19 front.

20 The weather service is particularly concerned
21 about it. They made statements to Nassau County in
22 1975 and 1976 specifically about Long Beach Island,
23 and specifically about the problem of evacuation from
24 Long Beach Island which has 50,000 people, three
25 bridges, all of which are in a flood plain, so that

1 to go over the bridges in itself, if you don't get a
2 lot of warning, you'll definitely be caught because
3 you are coming from a high hazzard flood area into a
4 flood area. And in fact the concern is so great that
5 Mr. Harold Gibson on television during Hurricane Belle
6 specifically mentioned his concern with Long Beach
7 Island.

8 Approximately two weeks ago Mr. Harold Gibson
9 came down to Atlantic Beach and spoke to residents
10 about the need for evacuation and about the problems
11 of evacuation. And we are saying that for the safety
12 of our children, our families, our neighbors, in fact,
13 that consideration must be given to building in an
14 area that is exposed to the ocean front because it
15 will cause much greater difficulties for all of us
16 on Long Beach Island in case of evacuation.

17 This hotel in itself can set a precedent for
18 the entire ocean front of Atlantic Beach being built
19 up in the equivalency of Long Beach, which now has
20 many hotels for the elderly and which would have to
21 be evacuated also in case of flood.

22 We are also asking for the Court, if we could,
23 to amend our complaint so that we could add the
24 Secretary of Housing and Urban Development, Honorable
25 Carla Hills to our complaint, because we feel that

1 we -- the Housing and Urban Development Corporation
2 has not followed the mandates of the Flood Insurance
3 Act as amended and the Flood Disaster Protective Act
4 to protect lives and property in flood plains, and
5 specifically in flood hazzardous areas.

6 THE COURT: I am not going to permit that
7 amendment. The amendment would require service on
8 the United States. They would then have 60 more days
9 to answer. It would delay the case interminably to
10 bring the United States into this thing.

11 That motion is denied.

12 MS. RADOW: We were trying to get the Weather
13 Service to come down today and --

14 THE COURT: Well, it is not necessary. We can
15 all take judicial notice that all along the east
16 coast you have this problem. You have it certainly
17 all along Fire Island where this Court has refused to
18 enjoin further building in Judge Doolings decision.

19 You have an Atlantic Beach in New Jersey. You
20 have that whole plain area. That is a typical area.
21 It is typical of the whole east coast. These low
22 lying islands are a part of the whole east coast
23 chain. They are the outer part of the bulwark for
24 the inner --

25 MR. RADOW: To the mainland.

106

106

1 THE COURT: To the inner what?

2 MR. RADOW: To the mainland.

3 THE COURT: Yes, the mainland, and inland water-
4 ways. It goes all the way down to Florida behind
5 barrier beaches. They're all subject to flooding.
6 And they are subject to hurricane devastation. The
7 Court takes judicial notes of the fact that they have
8 been devastated over the last forty years to my
9 knowledge. As you know, there have been breaks in the
10 barrier beaches. I am familiar with this area. The
11 bridges are, as you say, connecting the low lying
12 areas, and they will be dangerous whenever there are
13 hurricanes. And the more people you put into the
14 area the more people you have to evacuate. That's
15 all very clear. That doesn't give me the authority
16 to prevent this kind of building.

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18 (Continued on the following page)
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1 MRS. RUTH RADOW: South Hampton in 1974 --
2 South Hampton was told that it could lose its
3 eligibility for building on the exposed ocean front,
4 and that building was behind a -- the building proposed
5 was behind a Dune a hundred feet in. And in order to
6 comply with the flood insurance program there had to
7 be an elevation of fifteen feet for buildings --

8 THE COURT: Well, I am familiar with that too,
9 with the South Hampton and East Hampton building. There
10 has been extensive building on Dune Road, as you know,
11 of all these cooperatives, and some of them may present
12 danger. But that has not prevented people in that
13 area from getting flood insurance. And you have nothing
14 in your papers at all which indicates that your flood
15 insurance is going to be cancelled.

16 MRS. RUTH RADOW: We are not stressing flood
17 insurance before the Federal Court. Before the
18 Federal Court we are stressing the protection of our
19 lives under the Fifth and Fourteenth Amendments to
20 the Constitution.

21 THE COURT: But I do not see how this endangers
22 your life.

23 MRS. RUTH RADOW: Well, according to Mr. Gibson,
24 if you have a six to ten hour notice you can leave
25 Long Beach Island. If you have short notice you will

1 have much greater difficulty in leaving. He feels
2 there would be greater danger for a very short notice
3 and we feel --

4 THE COURT: There's no question about it.

5 MRS. RUTH RADOW: -- We feel seventy percent
6 higher.

7 THE COURT: There is no question about it.

8 MRS. RUTH RADOW: We feel we would have to
9 compete with these people to evacuate.

10 THE COURT: How many more people are being--

11 MRS. RUTH RADOW: If this one hundred and
12 seventy unit all year round hotel --

13 THE COURT: That's right. So there are 70
14 more units than the old hotel.

15 MRS. RUTH RADOW: No, sir. The old hotel was
16 a summer hotel, a two month hotel, and each unit can
17 have up to five people in it -- hotels such as the
18 Haldean -- can have five or six people in it, and
19 multiply that by 170.

20 THE COURT: Then I take judicial notice of that.
21 I have gone through all of this in connection with a
22 number of cases. I just recently had it in connection
23 with the Offshore Oil Drilling case which had extensive
24 testimony with respect to the location of people in
25 these areas, the increased risks that come from the

109

109

1 increased number of people that will be dependent upon
2 industrial and other developments. And there is no
3 question that as you increase the population in these
4 areas you increase the problems of evacuation,
5 particularly the area that you are talking about,
6 compared to those on the east coast in New Jersey, and
7 in other places. There was far better service so far
8 as evacuation is concerned. Fire Island for example
9 has to be evacuated by boat. You have some excellent
10 roadways, including the Jones Beach Causeway and the
11 Nassau County Bridge, both of which are modern
12 structures. I understand your concern. But I really
13 think you are in the wrong forum. This is a political
14 problem that has to be handled with the State which
15 has extensive wet lands regulations, and with the
16 localities, which as a political matter have to decide
17 what they want to do about tax rolls and the like.
18 There is a political aspect to this. They are
19 trying to build up their tax rolls, I suppose, to get
20 more income. There are school problems. There are
21 national problems in connection with the control of
22 these areas. These are political areas that I just
23 can't see how this Court can resolve.

24 MRS. RUTH RADOW: Well, we feel we are not
involved with the State Agencies. We feel that we are

1 involved specifically with all Federal agencies. The
2 weather services under the Department of Commerce.
3 The Army Corp of engineers, the Department of Defense--

4 THE COURT: What can I do to the weather service?
5 I can't issue any mandamus or injunction against it.
6 They don't make the weather.

7 The Army Corp of engineers does not control this.
8 It is behind the bulkhead line.

9 MRS. RUTH RADOW: The Army Corp of engineers
10 has given specific information which we are asking
11 the Court to direct the Housing Urban Development
12 Corporation and the Town of Hempstead to take notice
13 of.

14 The Army Corp of engineers talks about the
15 standard project tide. This is 12.3 feet above sea
16 level. They also talk about wave surge. None of these
17 things were taken into consideration by the Town of
18 Hempstead or HUD, for that matter, when they proposed
19 the building, 9 feet above sea level. The information
20 that was put into our record before the Board of
21 Zoning Appeals and which was given to you entitled
22 Flood Plain Information 1971 discussed the standard
23 project tide and interim project tide which is the
24 one that the Town of Hempstead is using.

25 Now, the information showing that the standard

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1 project tide can occur, that it has occurred, has been
2 ignored. We are saying that the building 9 feet above
3 sea level is not realistic according to the scientific
4 papers that we have presented here. And this was why
5 we wanted the weather service here.

6 When Mr. Gibson spoke before Nassau County he
7 said that buildings that aren't 20 feet above will
8 have problems, and yet the Town of Hempstead and
9 HUD want to put buildings on the exposed ocean front
10 only nine feet above sea level.

11 THE COURT: Mrs. Radow, I appreciate all the
12 effort you have put into it. I know you have done this
13 not only to protect yourself, but to protect a lot of
14 other people. I think your public spirited participa-
15 tion is commendable.

16 I will take any of your documents. But I
17 have a very heavy criminal calendar. I must get ahead
18 with those cases. If you like you can give the clerk
19 those documents. He will mark them as part of the
20 hearings here. Do you want to mark it as one document?

21 Get a large envelope please.

22 MR. SEYMOUR RADOW: Judge Weinstein, I would
23 like to say that the comparison between South Hampton
24 and South Hampton Beach, and Atlantic Beach or
25 Long Beach Island is similar in physical aspect, but

1 in population aspect, there is a tremendous difference.

2 THE COURT: Yes, South Hampton is not as
3 heavily populated. But East Hampton Beach, near
4 Dune Road now, which has been heavily built up is
5 now more densely populated than your area.

6 Your area is not as densely populated as the
7 area immediately to the West where they have and have
8 had for many years apartment houses, hotels and private
9 three family residences right up against the beach
10 practically. I am familiar with all that area. And
11 I appreciate the force of your arguments. If I were
12 in a different forum, as a legislator or an Executive
13 I might well take action. But I do not believe I
14 have any authority.

15 MR. MORRIS KRAMER: May I be heard?

16 THE COURT: Yes, but be brief, please.

17 MR. MORRIS KRAMER: Yes.

18 First we left out one term called North
19 Easters which are storms which can come up on short
20 notice and create more damage than even hurricanes.
21 I should point out that in this recent hurricane
22 Bell, Nassau County Executive Caso publically
23 suggested to people that they evacuate north to
24 sunrise highway -- north of Sunrise --

25 THE COURT: There were also evacuations on

1 the north shore.

2 MR. MORRIS KRAMER: For instance, Governor Carey
3 ordered the National Guard. But these people could
4 not have gotten there timely in order to save people --

5 THE COURT: Excuse me.

6 Your entire area could have been evacuated in
7 timely fashion given the notice given on this last
8 hurricane. I am familiar with your area.

9 MR. MORRIS KRAMER: There is no way the Senior
10 Citizens in Long Beach could have been evacuated --

11 THE COURT: You are not in Long Beach. You are
12 in a different area.

13 MR. MORRIS KRAMER: Yes, but egress-- to try
14 and rescue them or get them out --

15 THE COURT: Long Beach would have been evacuated
16 through the west over the main bridge.

17 MR. MORRIS KRAMER: The high tides would have,
18 as they have in the past, not blocked the bridge
19 but locked the access to the bridge. For instance,
20 the Long Island Railroad was closed down --

21 THE COURT: I am familiar with that entire area.
22 I was counsel to the Nassau County Bridge Authority
23 and I understand the problem. And there is a problem
24 here and it should be developed and attention must be
25 given to it. Now the State of New York is beginning
to give some attention to these wet lands. It has just

1 It has just adopted a comprehensive statute which
2 does not cover your problem because you are behind
3 the bulkhead. It is a developed area, as I understand.
4 The National Legislation is beginning to develop here.
5 It is not only a problem for you. It is a problem
6 along the Mississippi and along all of the areas that
7 have been built up in the flood plains because of the
8 increase in population and growth of land value.

9 MR. MORRIS KRAMER: Your Honor --

10 THE COURT: I cannot handle that as a Federal
11 Court. It is just beyond the capacity of the Federal
12 Court to handle. You have had your opportunity in
13 the State Court. Judge Suozzi is a fine Judge. You
14 could have taken appeal from Judge Suozzi's order,
15 intervened, and these issues have really been determined.
16 I may be wrong. If I am wrong I will be very happy
17 to have the Court of Appeals tell me to hold extensive
18 hearings. If they do send it back I will permit you
19 to bring in all the Government Agencies and we will
20 have full hearings.

21 MR. MORRIS KRAMER: You mentioned your hearings
22 before with the Interior Department. There now you
23 had all of the technical competent people around
24 apparently testifying on both sides. You issued what
25 in my opinion was an excellent ruling. You were over-

1 ruled. And this now still is going back into the Courts.
2 I am not getting into the technical competence involved
3 here. I am saying this is a Federal case involving
4 Federal problems. There is a Federal Flood Disaster
5 Act.

6 People in a flooded Colorado just died -- where
7 they are still looking for bodies mind you.

8 THE COURT: I understand that problem. I
9 appreciate your position.

10 MR. MORRIS KRAMER: My earlier comments before
11 you in June on the fresh water supply, salt water
12 intrusion, again they are Federal problems.

13 A Nassau County Executive is begging the Federal
14 Government to make Federal Funds available to New York
15 City so Nassau might get additional water.

16 THE COURT: You know, that is such an enormously
17 complicated problem, I know something about it.
18 It involves Aqua-Fers in Nassau and Suffolk. It
19 involves upstate sources of water for the City. It
20 involves sharing in the Metropolitan area. It involves
21 the sewage problem. It involves discharge of sewage to
22 sea or the injection back into the Aqua-Fers. I can't
23 handle all these problems. I am the District Court.
24 The District Court has limited jurisdiction. We don't
25 have judicial tyranny in this country where Judges

116

1 decide everything. If I could decide everything I
2 would take action in the case. But I am not in that
3 position. I don't believe I have any jurisdiction.
4 I believe the motion is properly made.

5 (Documents referred to received and marked
6 Plaintiff's Exhibit #1)

7 MR. MORRIS KRAMER: For instance, the United
8 States Environmental Defense --

9 THE COURT: Mark it as an exhibit, plaintiff's
10 exhibit two.

11 (Document referred to received and marked
12 Plaintiff's Exhibit 2)

13 MR. MORRIS KRAMER: I petitioned the United
14 States Environmental Protection Agency to clear the
15 Aqua-Fers in Nassau County and Suffolk County under
16 the Safe Water Act of 1974, Federal Legislation. It's
17 a Federal problem. I think it is in your -- in my
18 opinion, I would look for Federal Jurisdiction.

19 THE COURT: Well, all right, I can't.
20 Based on what I know is the policy of the Supreme Court
21 and the Court of Appeals of the Second Circuit. I do
22 not think I have jurisdiction to become involved in
23 this case.

24 Motion for Summary Judgment is granted. Submit
25 an Order of Judgment within 48 hours.

1 Now, you can take an appeal if you want to the
2 Court of Appeals. There is a procedure in Civil Cases
3 so that you may go before somebody who will discuss it
4 with you and assist you in proceeding further. If
5 you have any questions about how you proceed, the Clerk
6 of the Court of Appeals is over in Foley Square in
7 the Federal Building. You can't do anything until
8 after the judgment is entered. I will enter it
9 this week. You will get a copy of it from your
10 opponent. He'll order the minutes and file them, and
11 if you want to, you can take an appeal and go up.
12 We will see what happens. You may be right. I will
13 be happy to have you. I find these questions interesting.
14 I will be happy to try this case.

15 MRS. RUTH RADOW: Fine. I would be happy to
16 see you again.

17 THE COURT: Maybe I will see you again with all
18 the experts. It will be very productive for both of
19 us. I enjoy these cases.

20 Summary judgment on behalf of all defendants
21 against all plaintiffs.

22 * * * * *